



EMPLOYMENT TRIBUNALS (SCOTLAND)

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Case No: 4103680/2020 (V) Hearing by Cloud Video Platform (CVP) on 30
November 2020

Employment Judge: M A Macleod

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Miss A Young

Claimant
Represented by
Mrs W Barrett
Claimant's Mother

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JD Sports Fashion plc

Respondent
Represented by
Ms A Gray
Solicitor

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

25 The Judgment of the Employment Tribunal is that the claimant's claim is dismissed
for want of jurisdiction.

REASONS

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1. The claimant presented a claim to the Employment Tribunal on 9 July 2020
in which she complained that the respondent had unlawfully deprived her of
pay to which she was contractually entitled.
2. The respondent submitted an ET3 resisting the claimant's claim.
- 35 3. A Hearing was listed to take place on 30 November 2020 in order to
determine whether the Tribunal has jurisdiction to hear the claim, on the
basis that it was presented out of time.

4. The Hearing was listed to take place by CVP, in order to enable the parties to have the matter determined as soon as possible by the Tribunal. The claimant appeared, and was accompanied and represented by her mother, Mrs Barrett. Ms Gray appeared for the respondent.
- 5 5. The claimant gave evidence on her own account. No other witnesses were called to give evidence by either party.
6. Based on the evidence presented the Tribunal was able to find the following facts admitted or proved.

Findings in Fact

- 10 7. The claimant, whose date of birth is 2 February 1993, commenced employment with the respondent on 28 November 2009. Her employment ended on 21 February 2020.
8. The claimant contacted ACAS to notify them of her intention to make a claim against the respondent on 3 July 2020, and the Early Conciliation Certificate was issued immediately, by email, on 3 July 2020.
- 15 9. The claimant presented her claim to the Employment Tribunal on 9 July 2020.
10. The claimant submitted a grievance to the respondent in early 2020, which raised concerns about her manager (which do not form part of her claim to the Tribunal) and about her bonus payment. She had a meeting on 21 February 2020 with the respondent in which she was assured that the grievance would be dealt with within the respondent's normal timescale of 14 days. The claimant understood that the respondent's policy required them to provide a written response to the grievance within 10 working days of the grievance having been lodged.
- 20 25 11. The claimant contacted Ian Martin, an experienced Human Resources Adviser employed by the respondent, after 10 working days to say that she had not received an outcome. She emailed again on 9 March, having not received any further communication about the outcome of the grievance,

and considered that she was “repeatedly fobbed off”. She telephoned and emailed on a number of occasions thereafter and felt that there were a variety of excuses being presented by the respondent which did not clearly explain why there was such a delay.

5 12. On 27 March 2020, Mr Martin emailed the claimant to apologise for the delay. He said he was able to respond to the part of the grievance dealing with the claimant’s manager, but that he was unable to reply to the bonus grievance due to the financial information being “locked down”, due to the restrictions imposed as a result of the coronavirus pandemic. She was
10 informed on 9 April 2020 that due to the ongoing restrictions the respondent was unable to follow due process, but that Mr Martin expected to open the matter up as soon as possible in line with the procedure.

13. The claimant heard nothing for some time, and again contacted Mr Martin for an update on 9 June 2020, leaving a voice mail for him. Mr Martin
15 replied on 18 June 2020 to inform her that he had been furloughed for some 2 months by that stage, and that the relevant manager was off work.

14. The claimant contacted Mr Martin again on 23 June 2020, but found out that he had not yet completed his investigation.

15. The decision letter relating to the claimant’s grievance was issued on 24
20 June 2020. She felt that it was full of errors, and showed signs that it had been rushed. The outcome of the grievance insofar as relating to her bonus was that this was a “Retail decision”. The company bonus scheme was discretionary and the exercise of that discretion was the responsibility of the retail and area managers. As a result, her grievance was not upheld. The
25 claimant was annoyed and baffled that this information had taken so long to provide to her.

16. It was at that point that the claimant took steps to prepare to raise proceedings against the respondent before the Employment Tribunal.

17. Following her departure from the employment of the respondent, the
30 claimant took up a position working for NHS Scotland, in the Human

Resources team at National Services Scotland. She had a discussion with her line manager, the HR Team Leader for whom she worked, which alerted her to the possibility of raising proceedings in the Employment Tribunal. Up to that point, which was shortly before she contacted ACAS, the claimant had not looked into the possibility of raising proceedings. She “really didn’t want to go to Tribunal”, as she put it in evidence.

18. Around the start of July, she carried out an internet search which led her to the ACAS website, and that informed her that she had three months from the date when she should have been paid the bonus within which to present her claim to the Tribunal. She was very worried about this as she realised that she was probably outwith the statutory time limit for raising her claim against the respondent.

19. She did not take any steps prior to this as she did not think it would come to that. She was reluctant to take legal action against her former employer. In addition, she underwent a very stressful time in the first half of 2020. During the first period of lockdown imposed as a result of the coronavirus pandemic, the claimant was living with her former partner. Her relationship with her former partner had broken down in January 2020. They owned a house together, and the claimant required to consider what to do – whether to sell the house and divide the proceeds, or sell her share to him. It was decided in time that her former partner would seek to buy our her share, and he required to carry out some investigation into this. She said that it was a tense time when she was working from home and spending all her time with her former partner, as well as trying to work out what to do about the house. She described herself as “normally pretty on the ball”, but said that during that time she was not. She did not consult a doctor, as she said it was not in her nature to do so. The claimant has worked throughout this period, and has not had any time off due to illness.

20. The bonus payment, had it been allocated to her, would have been payable in her February salary payment, on approximately 25 February 2020.

21. The claimant was not aware of any other staff having raised proceedings before the Employment Tribunal in relation to unpaid bonuses, but she was aware that they were submitting grievances about this to the respondent.

5 22. The claimant accepted in cross-examination that she made a conscious decision not to raise proceedings before the Employment Tribunal because she wanted to resolve the matter internally rather than raising a claim.

23. When she raised her claim, the claimant drafted it herself, with the assistance of her mother. Neither the claimant nor her mother has any legal training or experience.

10 **Submissions**

24. For the respondent, Ms Gray invited the Tribunal to dismiss the claim on the basis that the Tribunal lacked jurisdiction to hear it, due to its late presentation.

15 25. She referred the Tribunal to section 13 of the Employment Rights Act 1996 (ERA), which is the statutory basis for this claim; and to section 23(1) of ERA which states that the claim must be presented within 3 months of the date when the payment was properly due to the claimant.

20 26. She observed that the Tribunal may exercise its discretion to permit the claim to proceed in the event that it was not reasonably practicable for the claim to have been presented in time, and that the claim was subsequently presented within such further time as the Tribunal considers to have been reasonable.

25 27. It is a question of fact as to whether it was not reasonably practicable for the claim to have been presented in time. The onus of proof rests on the claimant.

28. In this case, she pointed out that the claimant's employment ended on 21 February 2020, and that her final salary payment would have been payable on 25 February 2020. As a result, the claim should have been presented within three months of that date, namely by 24 May 2020. Early Conciliation

was commenced by notification of ACAS on 3 July 2020, and the Early Conciliation Certificate was issued on the same date. The time limit had already expired by the time when ACAS were notified, and therefore the claimant does not benefit from any extension of the statutory time limit thereby. The claimant did not then present her claim until 6 days after the Early Conciliation Certificate was issued.

29. Ms Gray argued that in determining whether it was not reasonably practicable for the claimant to have presented her claim in time, the Tribunal must consider all relevant factors, which in this case include what advice was sought, what extenuating personal circumstances prevented the claimant from seeking advice or whether the respondent provided any misleading advice or information about time limits. In this case, she submitted, the claimant said that she was suffering from stress and anxiety, though she continued to work throughout this period, and does not suggest that there was any misleading advice given by the respondent to her about this. She did undertake research into how to seek to enforce her rights.

30. Ms Gray also said that the delay of 6 days following the Early Conciliation Certificate is unexplained by the claimant

31. The claimant also said, she submitted, that had she known that Mr Martin was on furlough before she did she would have brought her claim. She knew about Employment Tribunals. There were no reasons for her to delay contacting ACAS to start the process of raising proceedings. Her personal difficulties do not justify the late presentation of the claim. There is nothing to suggest that she could not have undertaken research into this matter.

32. Ms Gray acknowledged that it was perhaps understandable why the claimant wanted to pursue the internal grievance and appeal before raising her claim to the Tribunal, but argued that that is not a sufficient reason to allow the claim to proceed.

33. She submitted that it was reasonably practicable for the claimant to have lodged her claim in time, based on her own evidence, but that she

consciously decided not to submit her claim until she had exhausted the internal proceedings.

34. Ms Gray went on to argue that even if it were not reasonably practicable for the claimant to have lodged her claim in time, she did not then submit it
5 within such further time as the Tribunal should consider to be reasonable.

35. Ms Gray argued that the claim should therefore not be allowed to proceed.

36. For the claimant Ms Barrett made a submission. She accepted that the claimant became aware of the 3 month statutory time limit by speaking to a colleague at her new work. She was only late, she said, because of the
10 unnecessarily protracted internal process followed by the respondent, which the claimant wanted to follow rather than raising an Employment Tribunal claim. The claimant and Ms Barrett are both lay people and thought it was appropriate to await the outcome of the grievance process, and once they became aware of the time limit problem, on 3 July, they wanted to take their
15 time to make sure that the claim was properly drafted before submitting it to the Tribunal.

37. Ms Barrett stressed that the grievance outcome should have been produced to them within a reasonable period of time, and the fact that it was not was the reason why the claim was late. She submitted that the delay was a
20 calculated one by the respondent.

38. There was no reason why Mr Martin, an experienced manager, would not have been aware that this was a matter for Retail when the grievance was presented in February 2020. The respondent, she said, has misled the claimant quite deliberately, and she said that she did not accept that the
25 delays were in any way due to the actions or inactions of the claimant.

39. Ms Barrett acknowledged that the claimant could have carried out research about the Tribunal process before she did, and also accepted that it was not necessary for the grievance to have been concluded before the claim could be lodged with the Tribunal. In mitigation, she said, the claimant acted in
30 good faith, and had trust and confidence that the respondent would deal

with matters appropriately. She trusted Mr Martin to conclude matters speedily, and she did not accept his excuses for failing to do so.

40. Employees should keep kept informed if a grievance process is suspended, but this was not done. This did not comply with the ACAS Code of Practice.

5 41. The claimant, she submitted, was not told numerous times about the time limit, but acted as soon as she became aware of this. Any reasonable person would look at the list of things she was undergoing and wonder how she managed to continue to work. The claimant suffered considerable stress and anxiety due to the break up of her relationship, the financial
10 settlement with her former partner, her new job, having to work from home full time and having to do so in the same place as her former partner under acrimonious circumstances, all the while being isolated from her family and suffering the uncertainty of the progress of the grievance during the pandemic.

15 42. Ms Barrett invited the Tribunal to exercise its discretion to allow the claim to proceed in these circumstances.

The Relevant Law

43. Section 23 of ERA sets out the basis upon which the Tribunal may exercise its discretion in extending time for a late claim in these circumstances.

20 44. What is reasonably practicable is essentially a question of fact and the onus of proving that presentation in time was not reasonably practicable rests on the claimant. “That imposes a duty upon him to show precisely why it was that he did not present his complaint.” (**Porter v Bandridge Ltd [1978] ICR 943**).

25 45. The best-known authority in this area is that of **Palmer & Saunders v Southend-on-Sea Borough Council 1984 IRLR 119**. The Court of Appeal concluded that “reasonably practicable” did not mean reasonable but “reasonably feasible”. On the question of ignorance of the law, of the right to make a complaint to an Employment Tribunal and of the time limits in
30 place for doing so, the case of **Porter (supra)** ruled, by a majority, 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.” On ignorance of time limits, the case of **Trevelyan (Birmingham) Ltd v Norton EAT 175/90** states that when a claimant is aware of their right to make a claim to an employment tribunal, they should then seek advice as to how they should go about advancing that claim, and should therefore be aware of the time limits having sought that advice.

Discussion and Decision

46. The first issue for determination by the Tribunal is whether it was not reasonably practicable – or not reasonably feasible – for the claimant to have presented her claim by 24 May 2020.

47. In order to determine this matter, the Tribunal must consider, firstly, the reason why the claimant presented the claim late.

48. In this case, the claim should have been presented by 24 May 2020, in order to be in time under section 23 of ERA. It was presented on 9 July 2020. The claimant does not benefit from any extension of the deadline through the Early Conciliation Scheme, as she did not notify ACAS until after the expiry of three months from 25 February 2020.

49. The claim was therefore presented some six weeks out of time.

50. The claimant has set out a number of explanations as to why the claim was presented late. She said that she was suffering from a certain amount of stress at the time when her employment with the respondent ended; she said that she acted in good faith by awaiting the internal resolution of her grievance before presenting her Tribunal claim; and she said that she did not know how to make a claim, or whether there were time limits within which to do so.

51. As Ms Barrett put it in her submission, while she accepted that the claimant could have researched the matter online before 3 July, and that she did not require to await the outcome of the internal process, the delays in dealing with her grievance, and the failure of the respondent to keep her fully

informed as to what stage her grievance had reached, should be taken into account as mitigation of her late presentation of the claim.

52. The difficulty for the claimant, however, is that the Tribunal cannot take mitigation of her late presentation of her claim into account unless it demonstrates to the Tribunal's satisfaction that it meant that it was not reasonably practicable for her to present her claim by 24 May 2020.

53. Looking at the three points raised by the claimant before me, the first was that the claimant was suffering from a degree of stress and anxiety owing to her personal circumstances at the time she left her job: she was living with her former partner, with whom her relationship had recently broken up, which she found difficult; she had to consider what to do about their jointly-owned house, and needed her former partner to make a decision on that as well; and she had to start a new job in the NHS, full time, working from home in the same place as her former partner.

54. In my judgment, while there is no doubt that the claimant was enduring difficult circumstances at that time and up to 24 May 2020, for which the claimant deserves a degree of sympathy, this explanation falls far short of the stringent test imposed upon claimants in these circumstances, of showing that it was not reasonably practicable for her to have lodged her claim because of all that was happening to her. She did not require to be absent from work during this time, and as a result, it follows that nothing prevented her from being able to do what she did in July, namely contacting ACAS and drafting and submitting her claim.

55. In order for these circumstances to amount to facts showing that it was not reasonably practicable or feasible for her to have presented her claim, it would be necessary for the claimant to show that she was somehow incapable of pulling together the necessary information and understanding of the law and the Tribunal process to be able to present her claim. When she did present her claim, she did so in a clear and straightforward manner, and there is nothing in the evidence to show that she could not have done

so prior to 24 May due to the circumstances in which she was living at that time.

56. The second explanation was that she did not want to make a claim to the Tribunal without going through the internal process first. While that is understandable, the claimant's acceptance in submission that she did not have to await the outcome of the grievance process is quite correct. The authorities are clear that, of itself, awaiting the outcome of an internal process is insufficient to demonstrate that it was not reasonably practicable for the claimant to have presented her claim in time (**Palmer & Saunders**).

57. However the claimant's third explanation was that she was ignorant of the Tribunal process, and in particular of the time limits within which to present her claim. I accept as a matter of fact that she did not know of the time limit until 3 July 2020, when she was informed of it by her line manager, and this was reinforced by the information obtained from the ACAS website. In the case of **John Lewis Partnership v Charman EAT 0079/11**, the EAT upheld a decision by an Employment Tribunal finding that the claimant, in that case, was reasonably ignorant of the time limits, and that in the circumstances of that case, it was not reasonably practicable for the claimant to have presented their claim in time, having awaited the outcome of an internal appeal.

58. I consider that the circumstances of this case are distinguishable from that case, however. In this case, the claimant, plainly an intelligent and resourceful individual, was able, quickly, to establish by research what the law said in relation to time limits, albeit too late to assist her here. She made clear in her evidence that she decided not to take Tribunal proceedings until the internal process was completed. She accepted in submission that she could have researched the matter easily, and had she done so, she would have been readily able to establish the time limit within which she had to act.

59. As a result, I am not persuaded that the circumstances of this case demonstrate that it was not reasonably practicable for the claimant to have

presented her claim in time. She could have researched the matter well before she did, but chose not to as she wanted to await the outcome of the internal process. She has been critical of the respondent for failing to comply with their own timescales or even follow a reasonable timescale under the ACAS Code of Practice, and that criticism may be well founded; however, had she researched the matter, as she quite readily could have done, she would have known that awaiting that outcome might take her beyond the statutory time limit, and that that was a matter which she could attend to herself.

60. The claimant's position before me appears to be that it is the respondent's fault that she missed the deadline. While the respondent has not covered itself in glory in the way in which this grievance was handled, the responsibility for the presentation of the claimant's claim lies with the claimant herself, and in these circumstances I regret that I am unable to find that it was not reasonably practicable for the claimant to have presented her claim in time.

61. As a result, it is my judgment that the claim must be dismissed as the Tribunal has no jurisdiction to hear it, as it is time-barred.

Employment Judge: Murdo Macleod
Date of Judgment: 05 January 2021
Entered in register: 12 January 2021
and copied to parties