



EMPLOYMENT TRIBUNALS

Claimant: Mrs S Tarbatt

Respondent: Manchester Airport PLC

Heard at: Manchester

On: 25 May 2021

Before: Regional Employment Judge Franey
(sitting alone)

REPRESENTATION:

Claimant: In person

Respondent: Ms E Elmerhebi, Solicitor

JUDGMENT AT PRELIMINARY HEARING

1. The complaint of breach of contract in relation to notice pay is dismissed upon withdrawal by the claimant.
2. The complaint of unfair dismissal is dismissed because it was presented outside the time limit specified in section 111 Employment Rights Act 1996 when it was reasonably practicable for it to have been presented within time.

REASONS

Introduction

1. On 10 March 2021 the claimant presented her claim form complaining of unfair dismissal and a failure to pay notice pay arising out of the termination of her employment as an Aviation Security Officer on 14 October 2020. It was immediately apparent that there was likely to be a time limit issue, and Employment Judge Holmes gave directions for the case to be listed for a telephone case management hearing on 25 May 2021.

2. The response form of 13 April 2021 resisted the complaints on their merits. It pointed out that the claimant had received pay in lieu of notice. It also asserted that the unfair dismissal complaint was indeed out of time.

3. On 5 May 2021 Employment Judge Ross ordered that the hearing be converted to a two hour public preliminary hearing to determine the time limit issue, which at that stage appeared to affect both claims. However, the format of the hearing had not been changed from the original telephone conference call.

4. Members of the public had access to this hearing by contacting the Tribunal, whereupon they would have been provided with the relevant codes to dial in to the conference call. As it transpired no members of the public asked to join this hearing.

5. Even so, I indicated to the parties at the start of the hearing that hearings of this kind would normally be conducted by video conference call, or in person, rather than by telephone. I offered them both the chance to say that they would prefer a video hearing on another date.

6. For the respondent Ms Elmerhebi confirmed that she was happy to proceed as a telephone hearing. The claimant considered the matter and after discussion said that on balance she would prefer to proceed rather than have further delay.

7. I was satisfied that conducting the hearing by telephone was fair. There was no challenge to the factual evidence which the claimant gave, and although I did not have copies of the relevant emails she was able to confirm the date of them and read them out to me as part of her oral evidence.

8. The claimant accepted at the start of the hearing that her complaint seeking notice pay was unsustainable because she had been paid in lieu of notice. She had ticked that box only to indicate that she wanted compensation for losing her employment. That complaint was rightly withdrawn, and is dismissed.

Time Limit Issue

9. The unfair dismissal complaint remained live but the time limit issue had to be determined.

10. Employment ended on 14 October 2020 when the claimant was informed verbally at the end of a capability hearing that she was being dismissed with

immediate effect. Under section 97(2) of the Employment Rights Act 1996 (“ERA”) the claimant is entitled to add on to the effective date of termination for statutory purposes the two weeks of notice to which she was entitled under section 86 ERA. That means that the effective date of termination for unfair dismissal purposes was 28 October 2020.

11. Early conciliation is required before an unfair dismissal complaint can be pursued. The last date for seeking early conciliation was 27 January 2021. The claimant in fact began early conciliation on 15 January 2021. It ended the same day because she said she was unwilling to conciliate with the respondent.

12. This meant that the primary time limit was going to expire within one month of the date the certificate was issued, and therefore under section 207B(4) ERA the time limit expired one month after the certificate was issued.

13. This meant that the last day for the claimant to lodge her claim form with the Tribunal was 15 February 2021. It was not lodged until 10 March 2021, some three weeks and two days late.

14. The issue for me to determine was twofold:

- (a) Was it reasonably practicable for the claimant to have presented her claim by 15 February 2021?
- (b) If not, was the claim presented within such further period as I consider reasonable?

Evidence

15. I heard oral evidence on affirmation from the claimant and I had the benefit of an electronic bundle supplied by the respondent. It included the claim and response forms, and the notes of the capability meeting on 14 October 2020 at which the claimant was dismissed.

Relevant Legal Principles

16. The time limit for an unfair dismissal complaint appears in section 111(2) of the Employment Rights Act 1996:

- (2) 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.**

17. The provisions of section 207B provide for an extension to that period where the claimant undergoes early conciliation with ACAS. In effect initiating early conciliation “stops the clock” until the ACAS certificate is issued, and if the claimant

has contacted ACAS within time, she will have at least a month from the date of the certificate to present her claim.

18. Two issues arise: firstly, whether it was not reasonably practicable for the claimant to present the complaint before the time limit expired, and, if not, secondly whether it was presented within such further period as is reasonable.

19. The principles to be applied under section 111 have been considered in many cases. What is reasonably practicable and what further period might be reasonable are ultimately questions of fact for the Tribunal: **Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293**. A liberal approach in favour of the employee is appropriate.

20. Something is “reasonably practicable” if it is “reasonably feasible” (see **Palmer v Southend-on-Sea Borough Council [1984] ICR 372**, Court of Appeal). The court approved the statement in **Bodha v Hampshire Area Health Authority [1982] ICR 200** that the existence of a pending internal appeal does not of itself justify a finding that it was not reasonably practicable to bring a claim.

21. An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits: **Trevelyan (Birmingham) Ltd v Norton [1991] ICR 488**.

22. The position where an employee relies on advice from a professional adviser arose in **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53**, where the Court of Appeal established that a claimant could not claim to be in reasonable ignorance of the time limit if she had consulted a skilled adviser, even if that adviser had failed to advise her correctly.

23. This and later authorities were reviewed by the EAT in **Northamptonshire County Council v Entwhistle UKEAT /0540/02** which acknowledged that in general:

“In such circumstances it is clear that the adviser’s fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal.”

24. However, in paragraph 9 the EAT concluded that there may still be cases where a mistake by a skilled adviser is not fatal to the claimant’s case:

“It is perfectly possible to conceive of circumstances where the adviser’s failure to give the correct advice is itself reasonable. ... The paradigm case, though not the only example, of such circumstances would be where both the claimant and the adviser had been misled by the employer as to some material factual matter (for example something bearing on the date of dismissal, which is not always straightforward). ...”

Relevant Findings of Fact

25. Having heard evidence from the claimant I made the following findings of fact.

26. It should be emphasised that I did not have any evidence from the union officials and there was nothing to challenge the claimant’s account of the advice she was given. I accepted her account in full for the purposes of this hearing.

October 2020

27. The capability hearing at which the claimant was dismissed occurred on 14 October 2020. She was accompanied by her union representative, Mr Clare. Before the hearing he told her that there were time constraints for bringing an Employment Tribunal claim, but not to worry about that. The claimant did not ask him what the time limit was. She was told at the hearing that she was being dismissed with immediate effect. Mr Clare advised her that she had to go through the appeal process before she could bring a claim.

28. The claimant did not carry out any research about Employment Tribunal time limits. She had no previous experience of an Employment Tribunal case. She trusted the union to advise her on how to proceed. Mr Clare was confident that her appeal would be successful in any event.

December 2020

29. Mr Clare was not available for the appeal hearing on 22 December 2020. The claimant was accompanied by Ms Mathews of the union. There was no advice given on time limits.

January 2021

30. The outcome of the appeal was communicated by email on 8 January 2021. The appeal was rejected and dismissal upheld. The claimant sent a Facebook message to Ms Mathews. Ms Mathews responded the same day. She said she was sorry to hear of the outcome and that if the claimant wanted to go to a Tribunal she should let Ms Mathews know and the union solicitors would deal. The claimant responded saying she did want to pursue it in that way, but received no reply.

31. The same day the claimant texted Mr Clare to tell him of the appeal outcome. She did not hear back from him until he responded by text message on 15 January 2021. His text message told her to go on the ACAS website and register for ACAS early conciliation, but that she should not actually go through any conciliation process because there was a time constraint. He did not tell her that there was a last date for lodging her claim but made clear she should do that as soon as possible.

32. The claimant went onto the ACAS website. She did not carry out any research on that website or by internet search generally about time limits, but simply started early conciliation but informed ACAS that she did not want to go through conciliation. The ACAS certificate was issued the same day by email confirming that early conciliation had concluded. She did speak to an ACAS conciliator who told her that ACAS did not have any involvement once the certificate was issued. She did not think to ask for advice on time limits. Instead she trusted her union to give her that advice.

33. The claimant managed to speak to Mr Clare on the telephone a day or two after the ACAS certificate was issued. He told her that the deadline for bringing a claim had passed and that it should have gone in by 13 January 2021. The claimant felt hopeless and upset that she had been given wrong advice. After speaking to her

husband and her father-in-law she was advised to complain about the advice from the union. She sent an email to the union head office a few days later by way of a complaint. It was eventually passed to Mr Chapplegill. The claimant had to chase a response a couple of times.

February 2021

34. Mr Chapplegill eventually responded by email on 15 February 2021. He confirmed that the last date for going into early conciliation had been 13 January 2021, and that an attempt to bring a claim in the Tribunal would be rejected if it was late. His email said it was not clear when she had started the early conciliation process.

35. The claimant responded by email of 16 February 2021 and set out the timescale. Again there was a delay before she heard anything back. She had to chase him up.

March 2021

36. On 8 March 2021 she telephoned and left a message saying she had not heard from him. This resulted in an email from Mr Chapplegill on 8 March 2021 at around 1.30pm. He told her that by all means she should submit a claim form herself, although he was not convinced that the Tribunal would allow it to progress. He told her not to put him or the union down as representative, but if the claim was accepted despite the time limit problem they would consider the prospects of success.

37. The claimant knew that the matter was urgent, although she still did not have any clear indication of the time limit. Due to family caring commitments and her desire to ensure that the information on the claim form was accurate, it took her a couple of days to put the information together and lodge the claim online on Wednesday 10 March 2021.

38. At no stage did the claimant undertake any internet research of her own to find out the position with Employment Tribunal time limits. She relied entirely on the advice she got from her trade union.

Submissions

39. For the respondent Ms Elmerhebi submitted that it was reasonably practicable for the claim to have been brought within time. The claimant knew at the time of dismissal that there were time constraints and could have researched them for herself on the internet. Similarly, once the appeal outcome was provided she could have made enquiries about Employment Tribunal time limits by searching on the ACAS website or asking the ACAS conciliator to whom she spoke. She could also have ascertained that there was nothing to prevent her lodging the claim on her own without the union doing it for her. Ms Elmerhebi also submitted that once the union confirmed to the claimant on 8 March 2021 that she could lodge the claim, bearing in mind that she was aware of a time limit issue, the two days she took was more than was reasonable at that stage.

40. The claimant submitted that she had acted reasonably throughout and that she was entitled to place her trust in the hands of the union. She emphasised that the appeal had taken an unreasonable period of time to be concluded and this had eaten away at the time available. She had trusted the union at all stages to look after her interests. When the appeal outcome came she had notified them immediately and had expected that they would tell her what could be done. When she learned from Mr Clare on the telephone a couple of days after 15 January that she had gone to ACAS too late she was very upset by that but had then put herself in the hands of the union's complaints procedure. Bearing in mind all the other demands on her she considered that she had acted reasonably throughout and that time should be extended.

Conclusions

Reasonably Practicable to Present in Time?

41. The first matter for me to determine was whether it was reasonably practicable for the claim to have been brought within time. This is not a test of whether the claimant acted reasonably, but whether it would also have been reasonable to have acted differently. Nor is it a test of whether the employer has acted reasonably.

42. The case law summarised above establishes the following points which are important here:

- If a claimant relies on advice from a skilled adviser who fails to advise properly, the question becomes whether it was reasonably practicable for the adviser to have provided the correct advice.
- An employee aware of the right to bring a claim can reasonably be expected to make enquiries about time limits.
- The existence of an internal appeal does not of itself mean that it is not reasonably practicable to bring a claim, since a claim can be lodged while an appeal is pending and then stayed until the appeal result is known. If the appeal result is successful the claim can simply be withdrawn.

43. At the time of dismissal, the claimant had been advised by Mr Clare that there was a time constraint for bringing an unfair dismissal complaint, but that it was necessary to go through the internal appeal first of all. That was not accurate: a claim form could have been lodged whilst an appeal was running. However, that is not a significant issue in this case because the appeal outcome was issued on 8 January, several days within the primary time limit.

44. Would it have been reasonably practicable for the claimant to have gone to ACAS to initiate early conciliation within a few days of the appeal outcome on 8 January? In my view it would have been reasonably practicable to have done so. The claimant made both Ms Mathews and Mr Clare aware on the same day that her appeal against dismissal had been rejected. Mr Clare knew about time limits; Ms

Mathews ought reasonably to have done so. It was reasonably practicable for them to have advised the claimant of the time limit for going to ACAS to “stop the clock”.

45. It appears from their interaction about ten days later than Mr Clare thought that the time limit expired on 13 January 2021. That was an error, because the effect of section 97 ERA in this case is to extend the effective date of termination by the two weeks of the statutory minimum notice period under section 86. However, I accept that it would not be reasonably practicable for a lay union representative to ascertain that technical point in response to a query from a member.

46. Nevertheless, even believing that time would expire on 13 January 2021 it was reasonably practicable for Mr Clare to have responded immediately to the text message of 8 January and to have informed the claimant of that deadline for contacting ACAS. Further, in my judgment it was reasonably practicable for the claimant to have ascertained those rules for herself if frustrated by the lack of assistance from her union in those crucial few days.

47. The claimant had dealings with ACAS via the website and speaking to a conciliator on 15 January 2021. In my judgment it was reasonably practicable for her to have enquired about time limits and to have ascertained one of two things:

- (a) That if she had gone to ACAS outside the three month period from the date of termination of employment it would be crucial to get a claim form lodged as soon as possible; or
- (b) That if she had gone to ACAS within the three month time limit she would have one calendar month at least from the issue of the ACAS certificate to bring her claim.

48. An enquiry in these terms producing either piece of advice would have made it reasonably practicable for the claim to have been lodged before the true deadline, which was 15 February 2021.

49. The claimant spoke to Mr Clare a couple of days after the ACAS certificate was issued. He told her that the deadline had passed and the claim should have gone in by 13 January 2021. Although this was technically incorrect, that may well have been a reasonable misapprehension on his part. However, he should still have advised the claimant to lodge the claim as soon as possible to minimise the delay and give her the best chance of overcoming time limits.

50. For those reasons, even with a liberal approach, the claimant has failed to show that it was not reasonably practicable for her complaint to have been presented within the three month time limit as extended by early conciliation. The unfair dismissal complaint is dismissed.

Further Reasonable Period?

51. This issue did not formally arise, given my conclusion in the previous paragraph, but I will indicate my view in any event.

52. In the period after speaking to Mr Clare in mid-January the claimant was choosing to pursue the matter through the union complaints procedure. That took her past the deadline of 15 February 2021.

53. Pursuing the matter in that way was a reasonable course of action, but it would have been equally reasonable to have lodged a claim form herself whilst also pursuing a complaint. In my judgment the claimant could reasonably have ascertained that lodging a claim herself was permissible rather than waiting until that was confirmed by the union in the email of 8 March 2021. Accordingly, even if it had not been reasonably practicable to have lodged the claim by 15 February 2021, in my judgment it was not lodged within a further reasonable period.

54. Had the only issue been whether the delay between 8 and 10 March 2021 was reasonable I would have found in favour of the claimant given the other demands on her. She wanted to take care to sort out her documents and make sure that the details on the claim form were specific and accurate, which is a reasonable position to take.

Outcome

55. It was reasonably practicable for this claim to have been lodged by 15 February 2021, and therefore the Tribunal does not have jurisdiction to deal with the unfair dismissal complaint. It is dismissed and this case is at an end.

Regional Employment Judge Franey

25 May 2021

JUDGMENT AND REASONS SENT TO THE PARTIES ON

1 June 2021

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