



EMPLOYMENT TRIBUNALS

Claimant: Mrs. J Evans

Respondent: Wexham Borough Council

Heard at: Wrexham Court Centre **On:** 2nd July 2021
and by video link

Before: Employment Judge R F Powell

Representation:

Claimant: In person

Respondent: Mr Searle, of counsel

JUDGMENT

The claim was not presented within the prescribed time period when it was reasonably practicable to do so. The claim is accordingly dismissed.

REASONS

The Application

1. Mrs. Jillian Evans, the claimant, presented a claim of unfair dismissal against her former employer, the respondent. Her claim was presented after the expiry of the three-month time limit , as extended by a relevant period of ACAS Early Conciliation.
2. Accordingly, she makes an application under section 111 (2)(b) of the Employment Rights Act 1996. The essence of her application, as set out in her written submission, is:
 - a. That, in all the circumstances, it was not reasonably practicable to present her claim in accordance with section 111(2)(a) and;
 - b. That she presented her claim in a further reasonable period.
3. The respondent opposes both limbs of Mrs. Evan’s arguments and invites me to strike out her case for want of jurisdiction.
4. Both parties have helpfully identified a number of relevant matters of fact which are not in dispute. As they were agreed and, in part documented, I will set them out before addressing the contentious issues which frame Mrs. Evan’s application.

Uncontentious findings of fact

5. Mrs. Evans gave notice of her resignation to the respondent on the 19th of December 2019.
6. Her notice period expired on the 26th of January 2020 and that was her effective date of termination.
7. She contacted ACAS for the purpose of Early Conciliation on 22nd of April 2020. ACAS issued a certificate on the 22nd April 2020.
8. The three-month time limit, for the purposes of section 111(1), expired on the 25th April 2020.
9. The Early Conciliation process, for the purposes of section 18A of the Employment Tribunals Act 1996, extended the time for presentation by one month.
10. The last date for a timely presentation of Mrs. Evans’ claim was the 25th May 2020.
11. The claim was submitted electronically on the 15th of September 2020.

Documents and witness evidence

12. I have had the benefit of considering the content of the ET1, ET3 and Mrs Evans' two-page document titled; Reasons for Late Submission, the content of which she adopted as her evidence in chief. She then provided further detail and explanation in the course of cross examination by Mr Searle, counsel for the respondent .
13. In cross examination the essence of Mrs. Evans case remained the same. The degree to which the various factors set out in her evidence had a material influence on the timing of the presentation of her claim became clearer.
14. After Mrs. Evans' oral evidence, I heard submissions from Mr Searle for the respondent and I then allowed Mrs. Evans, with the assistance of her husband, a 20-minute break to formulate her responses. I considered that approach to be appropriate as Mrs. Evans has no prior experience of the tribunal forum.

Mrs. Evans' evidence; findings of fact.

15. Mrs. Evans was an honest witness and ,although she has had some difficulty remembering a few precise dates, none of those particular dates were truly material in this case; the order of events was clear. There are only two instances where I have concluded that her recollection is incomplete.
16. In her evidence Mrs. Evans has presented a number of factors in support of her application. I will summarize them briefly but make the point that I have now read her arguments, as set out in her written submission, four times and it has been scrutinised before me during cross examination.
17. In section 3 of Mrs Evans' written submission she referred to a lack of resources. When I asked Mrs Evans to explain she said this referred to advice or representation to enable her to claim. She expanded upon the content of her document; explaining her account of a change of trade union representative in January 2020 which caused her to believe that the quality of representation had deteriorated. She gave evidence of the difficulty of accessing advice from solicitors , her union and made reference to the opinion of UNISON's solicitors, which she received indirectly through her union. That advice on her claim was not encouraging.
18. Mrs. Evans also gave evidence of the effect of the first and second lockdown; people losing their lives albeit she had not herself been ill with Covid.
19. Mrs. Evans also expanded on her written comments about the impact (on her case) of the respondent's pre dismissal behaviour and its impact upon her emotional wellbeing, losing her job, a sense of dislocation after she had resigned and a lack of contact with her former colleagues.

20. In her claim form she described feeling ; *“humiliated after my job then finally cheated out of another job offered to me. This is classic for bullying hearsay, nitpicking, malicious gossip spreading like a virus. Every human needs to belong and they made me feel like an outcast that last .”*
21. Mrs. Evan’s concern about the advice she received from UNISON was that she had not been advised of the time limit for bringing the claim to an Employment Tribunal .
22. In cross examination Mrs. Evans clarified that she had been advised by her union to contact ACAS but she could not recall if she had been advised of the last date for submission of a claim.
23. I accept it's unlikely that a union officer advising someone to start early conciliation would be in a position to advise, with precision, the latest date for presentation of a claim; that might be, in some cases, unknown until the process of conciliation had been completed.
24. However, I do find that it is more likely than not that Mrs. Evans had been informed that the 25th of April was the last date of the three-month period defined in section 111. I do so because the timing of her contact with ACAS (22nd April) and the completion of the conciliation process on that day.
25. Both of these actions are consistent with an understanding of the three-month time limit and the need to commence the Early Conciliation process within the said three-month period in order to gain the benefit of an extension of time for presentation of the claim.
26. Mrs. Evans states that she did not receive a copy of the ACAS certificate. She did not suggest that ACAS had failed in its duty to send the certificate by email; simply that she had not received it into her “inbox . I find it more likely than not that ACAS did email the first copy of the EC certificate in April 2020.
27. I find that Mrs. Evans took no action until sometime in June 2020 when she contacted ACAS to chase up the progress of her case and certificate. It was at this time that ACAS informed her that the certificate had been sent to in April and that a second copy was then sent to her.
28. Mrs. Evans then telephoned the regional office of the Wales Employment Tribunal on a number of occasions and, in their limited role to assist, the staff had provided her with a list of potential pro bono representatives such as Chester university , Citizens Advice and Advocate.
29. She also made contact with several solicitors’ firms by telephone. Some she said were too busy and others, for instance Thompsons, had taken a dim view on the merits of her case based on the “time” issue now before me.

30. I find that during the academic terms of 2020 Mrs. Evans was able to study online at degree level. She was capable of receiving and analyzing information and presenting her thoughts and analysis, via the internet, in writing.
31. I also find that Mrs. Evan's had a clear desire to bring a claim by the expiry of her notice and that, by the 26th January 2020 she had a sound knowledge of the events which she later set out in the claim form.
32. I note that Mrs. Evans was able to take advice from her trade union and in my judgment, she was able to understand that there was a time limit and she was able to understand the necessity of Early Conciliation as a precursor to bringing a claim.
33. I find that Mrs. Evans was physically and emotionally able to submit a claim albeit that doing so would have been an emotionally stressful task.

The law

34. Section 111(2) of the Employment Rights Act 1996 states that the time for the presentation of a claim to the employment tribunal runs from the claimant's effective date of termination and that the employment tribunal shall not, a mandatory direction, accept a claim presented outside of that time period save for:
 - a. An extension by the operation of section 18A of the Employment Tribunals Act 1996, or;
 - b. that it was not reasonably practicable for the claimant to have presented the claim within the prescribed three months.
35. The case of Dedman v British Building and Engineering Appliances Limited 1974 ICR 53, CA directs me to adopt a liberal construction of section 111(2)(b) in favour of employees.
36. I am also guided by the authority of Porter v Bainbridge Ltd 1978 ICR 943, CA; that the onus of proving that presentation in time was not reasonably practicable rest on the claimant.
37. I am further guided by the judgment of Lady Justice Smith in Asda Stores limited v Krauser EAT 0165/2007 where she explained in the following words;

“ the relevant test is not simply a matter looking at what is possible but to ask whether on the facts of the case as found it was reasonable to expect that which was possible to have been done.”
38. The diversity of different circumstances in which claimants may find themselves inhibited or prevented from presenting a claim is unbounded; I take all of the claimant's circumstances into account. Although these reasons have reflected the character of each circumstance discretely, I have formed my judgment through an analysis of their cumulative effect.

Was it practical for Mrs. Evans to have presented the claim on a before the 25th of May 2020?

39. Mrs. Evans was clearly aware of her right to commence proceedings in the Employment Tribunal and the character of the case she wished to bring by her effective date of termination .
40. She was able to communicate effectively via the internet and her university course demonstrates that she was, at the material time, able to formulate and express herself in a cogent manner.
41. Mrs. Evans was, by the 22nd of April 2020, able to complete the ACAS Early Conciliation process and obtain a one-month extension. This she did with some guidance from her Union.
42. I take note that the three-month time limit for presenting a claim is readily available on the internet and is set out in ACAS's online guidance to employees seeking early Conciliation.
43. In my judgment, it was practical for Mrs. Evans to have completed her ET1 form, setting out her case in an informal and narrative style, and to have made prompt efforts to obtain a copy of her Early Conciliation certificate between the 26th January and the 25th May 2020. In my judgment it would also have been practical to do so between the 22nd April and the 25th May 2020.

Was it reasonably practical for Mrs. Evans to have presented her claim on a before the 25th of May 2020?

38. In Walls Meat Co v Khan Lord Denning formulated the question for the employment tribunal as follows;

"...had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights - or ignorance of the time limit - is not just cause or excuse, unless it appears that he or his advisers could not reasonably be expected to have been aware of them. If he or his advisers could be reasonably have been so expected it was his or their fault and he must take the consequences...."

39. In answering this question, what will be relevant will always be fact and case specific. In the Walls Meat Co v Khan case Brandon LJ consider the question as follows; see paragraph 44:

"... The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand or the mistaken belief on the other is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making

such inquiries as he should reasonably in all the circumstances have made or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

40. Brandon LJ then expanded upon the circumstances in which ignorance, as opposed to a mistaken belief, might give grounds for a finding of reasonable impracticability:

"46. With regards to ignorance operating as similar impediment, I should have thought that, if any particular case an employee was reasonable ignorant of either (a) his right to make a complaint of unfair dismissal at all, or (b) how to make it, or (c) that it was necessary for him to make it within a period of three months from the date of dismissal, an industrial Tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.

47. For this purpose I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of (a) the existence of the right, or (b) the proper way to exercise it, or (c) the proper time within which to exercise it. In particular, so far as (c), the proper time within which to exercise the right, is concerned, I do not see how it can justly be said to be reasonably practicable for a person to comply with a time limit of which he is reasonable ignorant."

44. In determining this issue, I take into account all of the factors raised by Mrs. Evans. These include the emotional distress of her constructive dismissal and the adverse impact on Mrs. Evan's self-esteem .

45. I also take into account, if I may put it this way; the trepidation of entering the formal environment of an Employment Tribunal without professional representation. I do however note that presenting a claim via the internet is usually less daunting than attending a contested hearing without assistance.

46. I also take into account that the above factors, may affect many unrepresented people who have been dismissed and who are able to present their claims in a timely manner.

47. I also take judicial note that about 50% of the parties that come before the tribunal, both respondent and claimant, are not represented.

48. I accept that searching for guidance and representation is a reasonable action. I also accept that delaying dealing with a difficult personal issue can, for a period of time, be reasonable. However, as the statutory time limit approaches, after the better part of four months (allowing for the early conciliation extension), that which was once reasonable is no longer so.

49. Further, I take into account that Mrs. Evans was, somewhat later, able to submit her claim without the assistance of a professional advisor.

50. I turn first to Mrs. Evan's ignorance of the time limits

51. In my judgment Mrs. Evans' ignorance of the time limit for presenting her claim was not reasonable. Information is readily available on a "google" search for "unfair dismissal" or "employment tribunal claim". As I have noted above ACAS also offers guidance on the time limits to those using its Early Conciliation service.
52. Lastly, whilst I can accept that Mrs. Evans, in her evidence in July 2021, could not recall if she had been advised of the time limits when her union advised her to start early conciliation in April 2020, I have found that it is more likely than not that she was so informed.
53. There is another element in Mrs. Evans' submission which had was not present on her written documentation but which I have referenced in my findings of fact; the absence of receipt of the EC certificate in April 2020.
54. Mrs. Evans explanation for her inaction following her 22nd April 2020 contact with ACAS was her belief that ACAS was by some means vetting the prospects of her potential claim. I have difficulty accepting that perspective. Mrs. Evans' had "opened and closed" the Early Conciliation process on the 22nd April; there was no further action for ACAS to undertake. Further, Mrs. Evans had not provided ACAS with a draft of her ET1 and so, there was little rational basis for her perspective.
55. Taking all of the above I have reached the conclusion that Mrs. Evans had, in the four months between her effective date of termination and the 25th May 2020 sufficient knowledge of the facts of her case, the right to bring a claim, the time limits and the ACAS process to have presented her claim earlier than the 25th May 2020. Whilst it was, for the greater part of the four months, reasonable to seek representation, it was not reasonable to have placed greater importance on representation than acting in a timely manner.
56. Similarly, when Mrs. Evan's could not find her EC certificate, it was reasonable to wait for a little while before contacting ACAS, but it was not reasonable to wait for close to two months before doing so.
57. For these reasons, I find that Mrs. Evans has not demonstrated that it was "not reasonably practicable" to have presented her claim by the 25th May 2020.
58. For the above reasons, Mrs. Evans' claim is without the jurisdiction of the Employment Tribunal and must be dismissed.

Obiter – The duration of a further reasonable period for presentation of the claim

59. Although strictly unnecessary, I went on to consider what further period of time would have been reasonable in the event that Mrs. Evans had succeeded on the first limb of the statutory test.
60. Mrs. Evans contact with ACAS in June 2020 led to the prompt delivery of a second copy of her EC certificate in June 2020.
61. In June she contacted the Employment Tribunal on the number of occasions and then sought advice and support of a professional character.
62. In the course of her evidence, I asked Mrs. Evans what had changed between May or June and the 15th September 2020 with regard to her ability to set out her case in writing and submit an online claim.
63. She described a growing realisation that there was little prospect of professional help and so she gradually found the will to start the process alone.
64. In late June 2020, she was aware her claim was out of time and the need to submit her claim was of the utmost urgency. By late June she had also had enough time, and made enough prior effort over the preceding five months, to recognise that the prospect of receiving professional advice or support was far from certain to be offered in the future. It was too remote a prospect to reasonably warrant further delay in presenting her claim.
65. Thus, by the 30th June 2020, Mrs. Evans' had all the necessary knowledge, information, fortitude and certification to present her claim.
66. Based on the above, I would have found that a further reasonable period for the presentation of the claim would not have extended beyond 30th of June 2020.

Employment Judge R F Powell

Dated: 21st July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche

NOTE:

This is a written record of the Tribunal's decision. Reasons for this decision were given orally at the hearing. Written reasons are not provided unless (a) a party asks for them at the hearing itself or (b) a party makes a written request for them within 14 days of the date on which this written record is sent to the parties. This information is provided in compliance with Rule 62(3) of the Tribunal's Rules of Procedure 2013.