



EMPLOYMENT TRIBUNALS

BETWEEN

Claimant
Miss J Stow

AND

Respondent
Serco Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD REMOTELY AT Plymouth **ON** 28 September 2021
By public telephone conference

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person
For the Respondent: Mr D Hogg of the Respondent

JUDGMENT

The judgment of the tribunal is that the claimant's unfair dismissal claim was presented out of time and 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.
2. I have heard from the claimant. I have heard from Mr D Hogg on behalf of the respondent. 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.
3. The respondent is the well-known international service company. The claimant Miss Jane Stow was employed by the respondent as a Regional Operations Manager with accrued service from 12 June 2006 until her dismissal by reason of redundancy which took effect on 28 August 2020. She did not appeal the respondent's decision to terminate her employment.
4. The claimant first approached ACAS under the early conciliation procedure on 28 October 2020 (Day A). The Early Conciliation Certificate was issued on 28 November 2020 (Day B). She presented these proceedings on 11 March 2021, and the claim is limited to one for unfair dismissal only.

5. The claimant had long service with the respondent and was understandably upset at her dismissal on 28 August 2020. In October 2020 she researched the position with regard to a potential claim and ascertained from the relevant government website that there were time limits for employment tribunal claims and that as a precondition she would have to obtain an Early Conciliation Certificate from ACAS. The claimant first approached ACAS on 28 October 2020, as confirmed in the certificate. The claimant asserts that the ACAS officer informed her that she would be contacted by a different conciliation officer to discuss her case, but that there was likely to be some delay because of the pandemic. The claimant asserts that her understanding was that she need not submit a claim until she had had that further conversation.
6. A different conciliation officer from ACAS then attempted to telephone the claimant on 27 November 2020 but the claimant was absent at work. When she tried to return that call, she was met with a voicemail facility. In the meantime, ACAS emailed the claimant the Early Conciliation certificate on 28 November 2020.
7. The claimant was then able to obtain alternative employment and at some stage during January 2021 the claimant telephoned ACAS again. They had a discussion as to why conciliation discussions had not taken place, but in any event the ACAS officer advised her to submit her tribunal claim because of the time restraints. The claimant did not do so until 11 March 2021.
8. The claimant says that she was upset as a result of a dismissal and unable to focus on the necessary process but does not assert that she was medically incapacitated in any way from preparing or submitting tribunal proceedings.
9. Having established the above facts, I now apply the law.
10. The relevant statute 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.
11. 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.
12. 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.
13. I have been referred to and 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.

14. In this case the claimant's effective date of termination of employment was 28 August 2020. The normal time limit of three months expired at midnight on 27 November 2020. The claimant first approached ACAS under the early conciliation procedure on 28 October 2020 (Day A). The Early Conciliation Certificate was issued on 28 November 2020 (Day B). The time limit was therefore extended under the Early Conciliation provisions by one month and expired on 28 December 2020. The claimant presented these proceedings on 11 March 2021 which was at least 10 weeks out of time.
15. Unfair Dismissal
16. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that she was confused by ACAS into thinking that she did not have to present proceedings until the conciliation process had been completed. However, the claimant accepts that she was aware within the primary limitation period there was a time limit on issuing proceedings and that it was essential to obtain an ACAS Early Conciliation certificate beforehand.
17. 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).
18. 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:-
19. 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.

20. 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".
21. 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).
22. 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 (in the context of the time limit under section 139 of the Trade Union & Labour Relations (Consolidation) Act 1992, which is the same test as in section 111 of the Act) at paragraph 16: "The question at "stage 2" is what period - that is, between the expiry of the primary time limit and the eventual presentation of the claim - is reasonable. That is not the same as asking whether the claimant acted reasonably; still less is it equivalent to the question whether it would be just and equitable to extend time. It requires an objective consideration of the factors causing the delay and what period should reasonably be allowed in those circumstances for proceedings to be instituted - having regard, certainly, to the strong public interest in claims in this field being brought promptly, and against a background where the primary time limit is three months."
23. In my judgment it was reasonably practicable for the claimant to have presented these proceedings within the relevant time limit as extended by the early conciliation provisions. The claimant was aware of the process for submitting tribunal proceedings having first obtained an ACAS Early Conciliation certificate within the initial three months' time limit. She was well enough to make contact with ACAS. She says that she was confused into thinking that no action was necessary until the conciliation process was fully completed. That is not an accurate statement of the law, and it is not the case that the claimant asserts that she was (wrongly) advised that she did not need to issue proceedings until the completion of that process. In my judgment was no impediment which prevented the claimant from presenting proceedings within time.
24. In any event, even if there were any such impediment, it is clear that the claimant was advised by ACAS at some stage during January 2021 that the claim should be submitted because of the time restraints. The claimant then failed to act until 11 March 2021, and I also therefore find that (even if it were not reasonably practicable to have issued the proceedings until then) they were not issued within such further period as was reasonable.
25. The claimant's unfair dismissal claim was therefore presented out of time and is hereby dismissed.

Employment Judge N J Roper
Dated: 28 September 2021

Judgment & reasons sent to parties: 13 October 2021

FOR THE TRIBUNAL OFFICE