



EMPLOYMENT TRIBUNALS

Claimant

Teresa Eileen Fellows

v

Respondent

B.L.I.S.S Residential care Ltd

Judgment

Heard at: Southampton

On: 26 October 2021

Before: Employment Judge Rayner

Appearances

For the Claimant: Mr Doughty of counsel

For the Respondent: Mr Andrews of counsel

The claim was filed outside the three month time limit, but it was not reasonably practicable for the claim to have been filed within time, and it was filed within a reasonable time, so that time is extended. the claim is in tie and the ET had jurisdiction to hear the claim.

Reasons

1. The claimant in this matter is Ms T Fellowes. She brings a claim of unfair dismissal against the respondent.
2. The claimant instructed Glanville's Legal Services to deal with her claim and Miss Rolls, who confirmed that she is a qualified solicitor, was allocated to the case. Miss Rolls gave evidence to the employment tribunal about the steps she took in assisting the claimant and in filing the claim for her client. Miss Rolls told the tribunal and I find as fact that this was the first time that she had filed a claim to the employment tribunal.
3. The timing of the application and the point at which Miss Rolls was dealing with this matter is relevant because it arose during the course of a global pandemic. The impact of the pandemic on many businesses up to and including the period of time between the claimants dismissal in October 2020 and the point at which the claim

was properly filed to the employment tribunal, albeit out of time in March 2021, has been significant. Many businesses have had to adjust the way that they work with staff been placed on furlough, staff working remotely, and staff being unable to attend at work at all because of ill-health shielding and or because of requirements to self isolate.

4. Miss Rolls told the tribunal and I accept that the business she works for had been impacted by the pandemic. She stated that at the time she was dealing with the claim, because of the ongoing coronavirus pandemic that she and other members of her firm were working remotely from the office and that of the two support staff allocated to the Department she worked in , one was on furlough and one was working on reduced hours part time three days a week.
5. I take judicial notice of the fact that during the period of time relevant to this case, the tribunal system and the court system more generally, had also been impacted by the pandemic. Some systems and processes may have taken longer than usual, despite the significant efforts made by court staff to keep the system running smoothly.

The background to the claim

6. It is not in dispute that the claimant was dismissed with an effective date of termination of 8 October 2020.
7. Miss Rolls told the tribunal that she notified ACAS on behalf of her client of the dispute on the 4 January 2021. Her contact with ACAS was therefore within the initial three-month period from the date of termination and was in time. Early conciliation did not resolve matters and the early conciliation certificate was issued on 10 February 2021.
8. Miss Rolls referred in her witness statement to section 111 of the Employment Rights Act 1996 which requires that a complaint of unfair dismissal be presented to the Employment Tribunal within a period of three months of the date of the matter complained of, in this case the dismissal.

9. She also referred to section 207B ERA which provides for an extension of time to facilitate conciliation, where the time limit would expire during the course of the period beginning with the day after ACAS notified of the claimant and ending one month after the date of early conciliation, the time limit is extended for a further month.

10. Miss Rolls asserted in her witness statement that the limitation period to bring the claim was extended by 36 days. She stated in her witness statement that the limitation date was therefore 13 February 2021. In fact, this is not the correct date and the time limit for filing the claim, as the time would have expired on the 10 March 2021.

11. Whilst Miss Rolls was mistaken about the date for filing the claim initially, her mistake would not have made any difference, had she filed the claim with the correct office, because what she did was take steps to ensure that she filed the claim on 11 February 2021, which on her own calculation, was two days before the expiry of the time limit, and, in respect of the actual time limit, was just under a month before the time limit would expire.

12. During the course of counsel submissions, I have been referred to a number of reported cases which address errors in calculating the time limit.

13. I observed that in this case the error in calculating the time limit is different from that in the case of *Deadman*. In that case, a professional adviser miscalculated the time limit, and relied upon the wrong deadline, and therefore filed the claim out of time. The cause of the delay and the claim being out of time, was his error about the time limit itself.

14. Miss Rolls filled in the form with the claimant's details and the details of the respondent, with the correct ACAS certificate numbers and with details of the claimant's claim. She sent it by post using first class post, to the tribunal on 11 February 2021.

15. The error that Miss Rolls made, was to send the claim form to Bristol employment tribunal, instead of Leicester central office, as is required by the presidential direction. Miss Rolls knew that there was a time limit, and knew what it was. She attempted to file the claim within the correct time frame. Her error was of a different type.
16. Miss Rolls said in her evidence before me that she believed that she had sent the claim form to the correct postal address. I accept that this was her belief and I find as fact that there was no reason for her to check the address once the claim form had been sent.
17. I also accept the submission made on behalf the respondent that the claimant, a qualified solicitor, can be expected to know what the presidential direction says in respect of the correct manner of filing a claim to the employment tribunal. Miss Rolls made a mistake and as a solicitor she is held to a higher professional standard than an unrepresented party would be.
18. Miss Rolls heard no more about the claim until she received a letter dated 10 March 2021 from the Bristol Employment Tribunal office stating that the claim could not be accepted and was being returned because it had not been sent in accordance with one of the prescribed methods of filing a claim. The letter set out the three methods by which a claim can be presented, one of which is to send it by post to the Employment Tribunal central office at the PO Box address in Leicester.
19. Miss Rolls told the tribunal and I accept that as soon as she received the letter telling her the claim has been sent to the wrong address, that she checked the file. She said she thought she had sent it to the correct office but saw at that point that the letter had not been sent to the correct office and therefore she dictated a letter to the tribunal with the correct address, which was typed by her support staff and sent the following day.
20. It was suggested to Miss Rolls that on receipt of the letter of 10 March that she could have filed the claim by electronic means on the same day, in which case it would have been possible for her to have filed the claim in time.

21. Miss Rolls accepted with the light of hindsight that this would have been possible. She accepted in cross examination that the reason she had not done so, was because she was unfamiliar with the process.
22. I find that the claimant solicitor had acted quickly to correct the error and that it was not unreasonable for her at that point, to use the same method she had used previously, and to post the letter to the correct address. Miss Rolls, working remotely and dealing with reduced support staff in another office took immediate steps to put right an error and ensure that the claim was filed. I find that she acted reasonably in taking the steps that she did take, and that the fact that there were other ways of dealing with the claim at that point, which might have resulted in an in time claim do not make the claimants actions unreasonable.
23. Miss Rolls told the tribunal that she did not realise that sending the claim form to the wrong address would mean that it would be rejected. She did not realise that the effect of sending the claim to the wrong address was that it would be treated as if it had not been filed at all.
24. I find that she believed that she was correcting a minor error to a claim which had already been filed, rather than filing the claim for the first time.
25. Miss Rolls gave evidence that she believed that she had filed her clients claim to the Employment Tribunal within the three month plus early conciliation timeframe. On her behalf counsel submits that although it was sent to the wrong address it was received by the tribunal, albeit the wrong office, within the prescribed period of time.
26. Alternatively, it is submitted on the claimant's behalf that if the claim was not technically made to the Employment Tribunal within three months, because it had been sent to the incorrect office, that it was not reasonably practicable for Miss Rolls to have filed the claim in time, because she did not realise that she had made a mistake and that until that mistake was pointed out to her on 10 March

2021 , there was no reason for her to take steps to correct the error and file the claim correctly.

27. Once she became aware of the error, it is submitted that she took reasonable steps and filed the claim within a reasonable time. I find that the claimant filed the claim correctly within 1 day of re being notified of her mistake and did so by taking immediate steps to have the letter retyped and sent out by post. She did not delay and used the method and documents already in existence.

28. Whilst I accept that she could have filed the claim by using a different method, her decision to simply correct the mistake and refile using the same method was not unreasonable, and I find as fact that her actions in filing the claim meant that she did file it within a further period of time which I find was reasonable within the meaning of section 111(2)b of ERA 1996.

29. The question I have had to consider is whether or not it was reasonably practicable for her to have filed her claim within time. If it was then the fact that she filed her claim within a further reasonable time makes no difference and the claim will be out of time and the ET would have no jurisdiction.

30. If it was not reasonably practicable, then the claim will be within time.

The Applicable Law

31. There is no dispute that the claim to the Employment Tribunal for unfair dismissal must be filed within three months plus any extension for early conciliation of the effective date of dismissal.

32. The Employment Rights Act 1996 provides that time can be extended if a claim is not filed within time , only if it was not reasonably practicable for the claim to be filed in time and if the claim was then filed within a reasonable time thereafter . (see section 111(2)b ERA 1996).

33. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points as follows:

34.1. The test should be given “a liberal interpretation in favour of the employee” (*Marks and Spencer plc v Williams-Ryan* [2005] 20 EWCA Civ 479, which reaffirms the older case law going back to *Dedman v British Building & Engineering Appliances Ltd* [1974] ICR 53);

35.2. The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was “reasonably feasible” for the claimant to present his or her claim in time: see *Palmer and Saunders v Southendon-Sea Borough Council* [1984] IRLR 119....

36.3. If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will [not] have been reasonably practicable for them to bring the claim in time (see *Wall's Meat Co Ltd v Khan* [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is which states as follows necessary to take into account any enquiries which the claimant or their adviser should have made;

37.4. If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee 5 (*Dedman*).

38.5. The test of reasonable practicability is one of fact and not law (*Palmer*).

39. The question I have considered is firstly, what constitutes effective filing of a claim with an employment tribunal, second, what the effect of a professional advisers honest mistake is on that process, and whether the lack of knowledge of a mistake means that it is not reasonably practicable to file the claim in time until that mistake comes to light?

The process for filing a claim to the ET

40. Rule 8(1) of schedule one of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013, (the ET Rules) states that a claim shall be started by presenting a completed claim form, using a prescribed form in accordance with any practice direction made under regulation 11 of the rules. Rule 11 supplements Rule 8.

41. Rule 11 concerns the rejection of an ET claim in the absence of the payment of a tribunal fee or omission application, and provides that the tribunal shall reject a claim if it is not accompanied by a tribunal fee or omission application. It states what will happen in the event of the rejection of the claim or part of it. Regulation 11 has not been repealed, although fees are no longer payable to the Employment Tribunal following the decision of the Supreme Court in our unison the Lord Chancellor 2017. This part of the rules does not assist with this case.

42. Rule 7 provides that the President may publish guidance for England and Wales and for Scotland as to matters of practice and as to how the powers conferred by the rules may be exercised.

43. Regulation 6 makes provisions in respect of irregularities and non-compliance with the rules and provides that

a failure to comply with any provision of these rules except rule 81, and others or any order of the tribunal... Does not of itself render void the proceedings or any step taken in the proceedings. in the case of such non-compliance the tribunal may take such action as it considers just which may include all or any of the following

a. Waving or vary the requirement

b striking out the claim or the response in whole or in part

c. Barring or restricting a party's participation in the proceedings

d. Awarding costs in accordance with rule 74 to 84.

44. A presidential practice direction regarding the filing of a claim to an employment tribunal was issued in 2020 and states at paragraph 5, that there are three methods of presenting a claim to an Employment Tribunal. It is clearly stated that where post is the method used, that the claim form must be sent to the employment tribunal, central office using a PO Box with a Leicester. (See employment tribunal's (England and Wales) presidential practice direction- presentation of claims (2020).
45. In order to file a claim with the employment tribunal a claim must be presented, by completing a prescribed claim form and presenting it to the employment tribunal in accordance with any practice directions made under regulation 11. (see rule 8, sch 1 ET Rules)
46. A claim may be rejected by the Employment Tribunal if the correct form is not used or there is a failure to supply minimum information. If the form does not contain information, it shall be returned to the claimant with a notice of rejection explaining why it has been rejected.
47. An employment judge shall reject claim referred to them, if they consider that the claim is one which the tribunal has no jurisdiction to consider or if it's in a form which cannot sensibly be responded to; or if does not have early conciliation number on the form or the name of the claimant on the claim form is not the same the name of the claimants in the early conciliation form or is one in which the respondents name is not the same on the claim form and the early conciliation form.
48. None of these situations applied to the claimants claim.
49. This claim was covered by rule 6 of schedule 1 of the ET Rules, which states *a failure to comply with any provision of these rules (except rule 8(1)) already ordered the tribunal..... Does not of itself render void the proceedings or any step taken in the proceedings in the case of such non-compliance the tribunal may take*

such action as it considers just which may include any of the following..... A number of matters are then set out.

50. Rule 8 (1) requires compliance with any presidential direction made under regulation 11.
51. The relevant Presidential direction which applied to this claim, was not made under rule 11, but under rule 7. Rule 7 states *that Any such guidance shall be published by the presidents in an appropriate manner to bring it to the attention of claimants, respondents and their advisers. Tribunals must have regard to any such guidance, but they shall not be bound by it.*
52. I asked both representatives for their submissions of the effect of noncompliance by sending a claim to the wrong address , would be.
53. The respondent relies on rule 6 , and submits that the effect of the rule, is that because of the exception, a failure to comply with rule 81 renders the proceedings or any step taken proceedings void. The claim has not been presented at all.
54. Mr Doughty for the claimant suggested that what had in fact happened was that the claimant had been received and then it had been rejected. He asserted that the rejection of the claim was similar to the rejections that have taken place in the cases referred to as of software box Ltd v Gannon and the Adams v British Telecommunications plc 2017 ICR 382.
55. Mr Andrews for the respondent submits that the claimant relied on the advice of her adviser and that her adviser, a qualified solicitor made a mistake regarding the method the filing claim. As a result of that mistake the claim was filed out time. He submits that it was reasonably practicable because the adviser knew of the time limits, and that the reason why it was not submitted in time was firstly because of her error and secondly because she did not file it by electronic means once it was sent back to her.

56. He submits that the strict principle set out in *Dedman v British Building and Engineering Appliances Limited* 1974 ICR 53 apply, and relies in particular on the following paragraph, :

*But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that man must abide by their mistake. There was a case where a man was dismissed and went his trade association for advice they acted on his behalf they calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was practicable for it to have been posted in time. He was not entitled to the benefit of the escape clause. See *Hammond v Haigh Castle and co-Ltd* 1973 ICR 148 . I think that was right . If a man engages skilled advisers to act for him and they mistake the time limit and presented too late he is out his remedy is against them . per Lord Denning*

57. Mr Doughty counsel for the claimant, asserts that the correct approach is as set out in the case of *Adams v British Telecommunications plc* 2017 ICR 382.

58. In that case Ms Adams presented a claim to the employment tribunal making allegations of unfair dismissal and race discrimination. Her claim was rejected on the grounds that the number of the early conciliation certificate was incomplete. On receiving the rejection on 19 February, 2 days after the time limit had expired, the claimant solicitor immediately presented new claims with the correct number.

59. The employment tribunal held that they did not have jurisdiction to hear the claim, holding that it was reasonably practicable the claim of unfair dismissal to be presented in time.

60. On appeal the EAT, Similar J president presiding, reviewed the relevant law. In that case rule 12 of the tribunal rules constitution was relevant because it concerned minor errors in the early conciliation numbers. At that point no escape route was provided for errors in certificate numbers.

61. Therefore, in that case the form had been returned to the claimant with a note of rejection explaining why it had been rejected.

62. In that case the first claim made had been validly rejected. As a result of rule 13(4), ET Rules, the correct date of filing of the claim was not the first date, but was the date that the second corrected claim was filed.

63. The employment appeal tribunal was referred as I have been to the case of *soft box ltd v Gannon*, in which the EAT Langstaff J president presiding, stated as follows

Once a claim is presented, it is presented. No question of acceptance as a separate act seems to me to be necessary. A claim which has been presented may be rejected for various reasons. It may subsequently be struck out. It may be amended. It may be modified. It may be withdrawn. It may be heard and determined. But it is unnecessary to talk of any process of acceptance. The Rules provide that, once a claim is presented, what can happen to it is not a process of acceptance but only a process of rejection or determination by one of the various means I have just described. Para 26

63.1. At paragraph 41 he states *Here, as it seems to me, the fact that a complaint was made within time and then rejected does not and should not, as a matter of principle, preclude the consideration of whether a second claim traversing the same ground is one in which the tribunal should have jurisdiction.*

64. Similar J reminded the parties that it is trite law that the question of what is or is not reasonably practicable is a question of fact for the employment tribunal. She referred to **Walls Meat co-Ltd V Carl**, in which it was stated Brandon LJ that, the performance of an act in this case the presentation 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, or the impediment may be mental namely the state of mind of the complainant in the form of ignorance or mistaken belief with regard to essential matters. Such states of mind however can only be regarded as impediments making it not reasonably practicable to present complaint and a period of three months if the ignorance on

the one hand the mistaken belief on the other is itself a reasonable. Either state of mind will further not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should in all the circumstances have made or the fault solicitors run professional advisers in not giving him such information as they should reasonably in all the circumstances have given.

65. Simler J then states, the focus is accordingly on the claimant state of mind viewed objectively. At paragraph 19 she states as follows

The question for the tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error, since had she been aware of it no doubt she would not have made it or it would have been corrected.

66. Mr Doughty asserts this is the with considerable the steps taken by the claimant's solicitor in this case.

Discussion and conclusions

67. Miss Rolls has the sympathy of the Tribunal. She made a mistake the first time she filed a claim to be employment tribunal. Her mistake was the claim was sent the wrong postal address.

68. Until that claim was returned to her I find that there was no reason for her to consider that any error or mistake had been made.

69. I find that the claimant solicitor then acted quickly to send a further second claim to the correct address.

70. I find that the delay between the date initially sent claim form to Bristol ET and the date that the claim form, being 28 days, was a significant period of time and longer than would be expected in normal circumstances.

71. February and March 2021 were not normal times. because of the coronavirus pandemic. Staff were absent on sick leave, and staff were isolating or working remotely. In this case, I find that it is highly likely that the delay of 28 days was the result of this pandemic.

72. In any event, the 28 day delay meant that it was not reasonably practicable for the claimant solicitor to file a second in time claim within the that time, or at any time prior to her being notified of the issue on the 10 March 2021.

73. As soon as the claimant was notified of the error made, she checked her file, and dictated a new letter to send with the claimant for to Leicester. There was a slight delay, because of staffing issues at her office. I find that she acted as quickly as it was reasonable for her to do at that point. It was not reasonably practicable for her to have taken those steps earlier, because she was not aware of the need for them.

74. Had the claim been returned to her earlier, I find that it is more than likely that she would have taken the steps a to rectify the mistake as quickly as she did on this case, and that the claim would have been issued in time.

75. I find that it was not reasonably practicable for her to have filed it earlier than she did, and that she filed it within a reasonable time there after. She filed it the following day, by post.

76. The claimant was therefore filed within time and the ET has jurisdiction to deal with it.

Employment Judge Rayner

Southampton

Dated 16 December 2021

Sent to the parties on

11 January 2022

By Mr J McCormick

For the Tribunal Office

Note: online publication of judgments and reasons

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The ET has no power to refuse to place a judgment or reasons on the online register, or to remove a judgment or reasons from the register once they have been placed there. If you consider that these documents should be anonymised in any way prior to publication, you will need to apply to the ET for an order to that effect under Rule 50 of the ET's Rules of Procedure. Such an application would need to be copied to all other parties for comment and it would be carefully scrutinised by a judge (where appropriate, with panel members) before deciding whether (and to what extent) anonymity should be granted to a party or a witness