



EMPLOYMENT TRIBUNALS

Claimant: Mr J Chapman

Respondent: Limpio Office Solutions Ltd

Heard at: Croydon (by CVP video) **On:** 17 February 2022

Before: Employment Judge Parkin

Representation

Claimant: Mr P Doughty, Counsel

Respondent: Ms R O'Connell, Solicitor

JUDGMENT AT A PRELIMINARY HEARING

The Judgment of the Tribunal is that the claimant's complaint of Unfair Dismissal was not presented in time, but it was reasonably practicable for him to have presented it in time. Accordingly, the Tribunal has no jurisdiction to consider the complaint and it is dismissed.

REASONS

1. The proceedings

By an ET1 claim presented on 4 January 2021, the claimant claimed unfair dismissal and outstanding holiday pay relating to his employment with the respondent between 4 October 2004 and 30 September 2020. He had made Early Conciliation notification to ACAS on 30 September 2020 and the Certificate was issued on 5 October 2020. He contended he had been unfairly selected for redundancy with an unfair procedure and lack of meaningful consultation, in relatively brief particulars of claim in 15 paragraphs covering 2½ pages. His named representative was Mr M Fitzgerald of Green Wright Chalton Annis, Solicitors.

2. The claim was acknowledged by the Tribunal on 29 January 2021 and listed for a final hearing on 29 September 2021. The respondent presented its ET3 response on 22 February 2021 without representation, resisting his claims and contending it had given the claimant a full 12 weeks' paid notice with his

redundancy payment and effectively contending it carried out a proper procedure in declaring him redundant. At that stage, the respondent did not raise out of time jurisdiction points.

3. On 20 May 2021 the respondent, by now legally represented, applied for a preliminary hearing to determine the out of time jurisdiction issues and renewed its application on 27 August 2021 as the final hearing approached. The claimant too sought to prompt the Tribunal as to whether any preliminary hearing was to be listed. In the event, the final hearing remained listed on 29 September 2021 with the application for a preliminary hearing considered at the outset of what became a case management hearing. Employment Judge Dyal made detailed and helpful directions and listed this hearing; although he was prepared to deal with the out of time issues relating to the holiday pay claims, the parties then settled that claim on the day.

4. The hearing

Following Judge Dyal's Order, the claimant's solicitor Mr Fitzgerald prepared and lodged a witness statement on 22 October 2021. However, he was not available to give oral evidence at this hearing, apparently having understood the matter would be determined on paper or oral submissions although Judge Dyal had expressly set out he was adjourning consideration of the Unfair Dismissal preliminary issues because of the absence of Mr Fitzgerald and had directed that any party seeking to call a witness at the hearing should lodge a witness statement in advance at the hearing. In the event, the respondent's solicitor did not seek that Mr Fitzgerald gave oral evidence.

5. I was greatly assisted by the respondent's solicitor and the claimant's counsel, both relying upon written submissions. There was a bundle of documents (1-64) which included Mr Fitzgerald's witness statement (40-8) and also correspondence between the parties in particular in late 2020 ahead of the presentation of the claim.

6. Mr Fitzgerald's evidence

Whilst I accept the timeline in the witness statement from Mr Fitzgerald, I cannot give the contents of the statement the same weight as if he had given oral evidence on these matters. Nonetheless, considerable weight must still be attached to evidence from a Solicitor who will understand fully his obligation to the Courts and Tribunals. What is noteworthy by its absence from Mr Fitzgerald's statement is any content relating to his advice given to the claimant about the time limit for an unfair dismissal claim (although, of course, he may have sought to rely on matters of legal professional privilege but did not do so) or about any personally directed information to the claimant about the office closure before Christmas and into the New Year. Within Mr Fitzgerald's statement, there is no sense of the urgency of the claimant's position having regard to the closure of the office and the expiry of the time limit early in the New Year being specifically impressed upon him. In respect of the final stage on 23 December 2020, he states simply: "On 23 December 2020 at 16.37 the claimant responded to my paralegal with his authority to submit the claim as drafted. Unfortunately, due to the time when the email was received, it was not possible to file the claim on-line until our offices re-opened on 4 January 2021" (43).

7. The Issues

Since the claimant by now accepted the complaint was presented out of time, the issues were straightforward: a) whether or not it was reasonably practicable to present it in time and b) if not, whether the complaint was presented within such further period as was reasonable.

6. The facts

From the documentary evidence, I made the following brief findings of fact. Having been made redundant on 30 September 2020, following a long notice given and served, the claimant first made enquiries of his solicitor on 7 October 2020, met him on 9 October and gave formal instructions to him soon after, resulting in an initial letter of claim to the respondent on his behalf on 19 October 2020 (49-50). There were genuine settlement discussions between the parties from late October until early December 2020. On 11 December 2020, the claimant's solicitor wrote to the respondent expressly maintaining that he was instructed to submit a claim to the Tribunal for unfair dismissal and indeed for holiday pay: "It is quite clear that there will not be a resolution of our client's unfair dismissal claim without the claim being presented to the Employment Tribunal. We are accordingly instructed to submit that claim on the basis that our client's dismissal was procedurally and substantively unfair" (60-61).

7. On 17 December 2020, the solicitors' draft grounds of complaint were sent to the claimant by email for approval. Early on the morning of 22 December, the solicitors chased these with a follow-up email and received the claimant's response at 12.02 that day that he did not have access to a computer, only his mobile phone for emails, and hoped to print the draft grounds the following afternoon (i.e. 23 December) and return with his instructions as soon as possible. The claimant then emailed comments on and amendments to the draft grounds at 14.52 on 23 December 2020, which the solicitors finalised and returned to him for final approval at 15.10 that same day.

8. These solicitors had a planned office closure over Christmas and New Year, ahead of Christmas Eve from the end of the working day on Wednesday 23 December 2020 through to Sunday 3 January 2021. Notice of the planned closure was shown at the bottom of their emails and correspondence in December.

9. The claimant provided his final authority to lodge the claim form at 16.37 on 23 December 2020, before the office closed at 17.00. At 11.36 on 4 January 2021, the claim was lodged electronically online as authorised by the claimant.

10. The parties' submissions

Contending the burden was on the claimant to prove it was not reasonably practicable to present his claim in time, the respondent relied on the judgment of May LJ in Palmer & another v Southend on Sea Borough Council 1984 ICR 372, such that the best approach is; "Was it reasonably feasible to present the complaint... within the relevant 3 months?". It relied upon the Dedman principle that a mistake as to the time limit by a skilled adviser is treated as that of the claimant and the Court of Appeal authority of Walls Meat v Khan, showing ignorance of rights or time limits by claimant or advisor, unless the ignorance was

reasonable, was no excuse. Even a late intervention by the Solicitors Regulatory Authority just before the time limit expired did not make it not reasonably practicable to present the claim in time, in Governing Body of Sheredes School v Davies (UKEAT/0196/16). The claimant's solicitor should have been aware of the actual limitation date and notified the claimant of it and of the need to lodge the claim with the Tribunal before the Christmas break, given the office closure which was foreseen. Yet even after 23 December 2020, the claim could have been presented online in time. The respondent did concede that, if it had not been reasonably practicable to present it in time, the claim was presented within a reasonable further period.

11. The claimant likewise relied upon Dedman, urging the Tribunal to enquire into the circumstances and decide whether the claimant or his advisers were at fault in allowing the time limit to pass by without presenting the complaint, such that it was not reasonably practicable to present it if neither were at fault. He contended the factors which were relevant were the claimant's solicitors taking proper and reasonable steps to seek to compromise the matter over two months from October to mid-December 2020, the draft particulars sent to the claimant on 17 December but with him then being unable to print, check and return the document until 23 December, when the finalised ET1 was sent to the claimant and returned by him the same day. The office closure then intervened and the combination of all these factors made it not reasonably feasible to submit the claim in time, but it was then presented early on the next day after the time limit expired, which was a reasonable further period.

12. The Law

Section 111 of the Employment Rights Act 1996 states:

(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(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...

Section 207B states:

(1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

(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...

I had regard to the various authorities cited, in particular by the respondent. There was no significant difference of legal approach between the parties. I therefore focussed upon the Dedman principle i.e. that a claimant could not claim to be reasonably ignorant of the time limit where he had engaged a skilled adviser, even if the adviser had failed to advise him properly about the time limit, and the guidance of the Court of Appeal in Palmer and Saunders v. Southend on Sea BC that the Tribunal must look at all the circumstances and apply a very practical test: was it reasonably feasible for the claimant to have put his ET1 claim in on time?

13. Conclusions

I did not need to consider in detail the statutory provisions under sections 111(2) and 207A since the parties agreed the claim was presented just out of time on 4 January 2021; time expired on 3 January 2021, by virtue of the combined effect of the primary limitation period of 3 months from 30 September 2020 and the short period of Early Conciliation which meant 5 days between the day after day A and day B were not counted for limitation purposes. Ultimately, having regard to the careful submissions of both parties, I had to determine the key question of fact, whether it was reasonably practicable for the claimant with legal advisers acting for him to present his claim in time, together with whether he or they were at fault in failing to do so.

14. Whilst acknowledging the claimant's technical difficulties at a late stage, these must be viewed in the context of an apparent absence of any urgent instruction to him about the imminent time limit expiry in early January, whether the solicitor's view was, as is implicit from his later correspondence on 22 September 2021 (63-64), that the time limit expired on 4 January 2021 or whether it was already appreciated that it actually expired on 3 January. The claimant's advisers had been instructed at an early stage and were corresponding with the respondent from 19 October 2020, albeit looking to achieve an agreed settlement until a little before 11 December 2020.

15. Although my general approach is based upon the established authorities, what those early cases did not consider and could not have envisaged at the time was the current common process of presenting Employment Tribunal claims and

responses, which is almost invariably online. Although presentation on paper is still permitted, it is now very rarely adopted. Here, it remained entirely open to the claimant or his advisers to present a claim online from 16.37 (less than half an hour before the office official closing time) on 23 December 2020 when he gave his final instructions to press ahead with the claim up until 23.59 on 3 January 2021. The modern process affords scope for far more late or last minute action on the part of litigants to comply with limitation deadlines than when most reliance was on Post Office deliveries.

16. In answer to the closely allied questions: was it reasonably feasible to present the ET1 claim form on time? and were the claimant or his advisers at fault in allowing the time limit to pass without presenting the complaint?, I conclude the answer to both is resoundingly “Yes”. It was reasonably practicable for this claimant with these professional advisers to present his Unfair Dismissal claim in time; if ignorant of the actual time limit, he and they were not reasonably ignorant. The claimant did not present it within the statutory time limit and therefore the Tribunal has no jurisdiction to consider his unfair dismissal claim, which is dismissed.

17. For the avoidance of doubt, had I concluded that it was not reasonably practicable to present the claim in time, I would certainly have determined (as was conceded by the respondent) that it was presented within a reasonable further period.

Employment Judge Parkin

Date: 21 February 2022

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