



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr James Lewis

**Respondent:** Sofidel UK Ltd

**Heard at:** by CVP at Cardiff

**On:** 23 February 2022

**Before:** Judge MM Thomas

## **Representation**

Claimant: Mr O Lawrence, Counsel

Respondent: Ms Oltan, Solicitor

## **JUDGMENT FOLLOWING PRELIMINARY HEARING**

### **The Judgment of the Tribunal is that:**

1. The Claimant's claim was presented on the 10 June 2021, a date which falls within the period of three months beginning with the effective date of termination.
2. The Respondent's application to strike out the claim on the ground that the Claimant failed to present his claim within the stipulated three month time limit is refused.

### **Reasons**

1. The decision was delivered orally at hearing however, a request was subsequently made by the Claimant for written reasons to pursue an application for costs. As such, in accordance with Rule 62 of the Employment Tribunal Rules, I provide the same.

### **The preliminary issue**

2. Whether the claim was presented outside the specified three month time limit, and if so, be dismissed on the basis that the tribunal does not have jurisdiction to hear it. In short, the Respondent's application is that the claim should be struck out on that basis under Rule 37 of the Employment Tribunal Rules.

### **Agreed facts**

3. It is not in issue that the Claimant was dismissed from his employment on 22 March 2021, and the latest date for presentation of the ET1 was on or before 21 June 2021. Further, that there was no extension of time under the ACAS early conciliation process as the date of EC notification and the EC certificate were both 17 May 2021.

### **Documents and Witnesses**

4. For the purposes of determining this preliminary issue the Respondent has provided a bundle of documents which runs to 132 pages in addition to, a written submission and a supporting list of authorities.
5. The Claimant has also provided a bundle of documents which is made up of five witness statements; the Claimant's, his brother Mr Brennan's, two from his uncle by marriage, Mr Dimaio, and one from the receptionist in the firm of solicitors in where Mr Dimaio was working at the time. There is also annexed to the witness statements various documents by way of text messages and telephone records, in support of statements made within them. I heard oral evidence from the Claimant, Mr Brennan and Mr Dimaio. All three witnesses adopted the contents of their witness statements as their evidence in chief. None of the witnesses amplified upon their contents in evidence.

### **Submissions**

6. The Respondent relies upon the contents of the written submission. In closing Ms Oltan refers to section 111(2)(a) and (b) of the ERA 1996 which provides that an employment tribunal shall not have jurisdiction to hear a complaint of unfair dismissal unless it is presented to the tribunal within the period of three months beginning with the effective date of termination. This primary time limit is subject to section 111(2)(b) which allows a tribunal to extend time to accept a claim where it finds that it was not reasonably practicable for the claimant to present the claim in time, and the claim was presented within such further period as the tribunal considers reasonable. It is the Respondent's submission that the claim has not been presented in the relevant time limit and there are no grounds for the tribunal to exercise its discretion to extend the time limit.
7. In its submission, the Respondent also refers to a number of different case authorities however, I find the majority of the authorities referenced refer to cases where the complainant has missed the deadline. These are not the circumstances before me. The Claimant does not suggest he missed the deadline, he contends he presented the claim

to the tribunal some days prior to the deadline and had confirmation from the tribunal that it had been received some days prior to again, the deadline.

8. I am referred by Mr Lawrence to **Consignia plc (formerly the Post Office) v Sealy 2002 ICR 1193, CA, Hammond v Haigh Castle and Co Ltd 1973 ICR 148, NIRC, and Software Box Ltd v Gannon [2016] ICR 148 EAT.**

### **The Law**

9. 'Presenting' for the purposes of starting tribunal proceedings has a specific meaning. In **Hammond** it was held 'a claim is presented to a tribunal when it is received by the tribunal, whether or not it is dealt with immediately upon receipt'.
10. **Consignia** at para 31 provides guidance as to the approach to adopt. The opening paragraph is that a complaint is presented when it arrives at the Central Office of Employment Tribunals or at an Office of the Tribunal.
11. In **Post Office v Moore 1981 ICR 623, EAT**, to which neither party referred, the EAT held that the presentation of a complaint does not require the cooperation of a tribunal clerk or official. It only requires physical delivery at the tribunal offices.
12. **Software Box Ltd** confirms the position that nothing in the legislation provides for a claim being 'accepted' or 'validly presented', in short, once the claim is presented, it is presented.
13. The standard of proof is the civil standard, the balance of probabilities, that is 'more likely than not'. Therefore, when considering the evidence collectively, my approach has been, is it more likely than not that the Claimant's account is a true account.

### **The Facts and My Findings**

14. To summarise, the Claimant's position is that the ET1 was presented to the tribunal in time however, because of some administrative error, it has been lost/mislaid/misfiled by the tribunal. In short, it is not a situation where the Claimant has missed a date and is looking to extend time, his case is, to put it simply, that he presented his claim within the stipulated time limit, and the fact that the Tribunal have lost/mislaid/ misfiled it, is not his fault.
15. I do not intend to repeat verbatim the Claimant's evidence as he has set out a detailed account in relation to the steps that he took to ensure the presentation of his claim in time.
16. In short, following his dismissal he took advice from the employment director of Douglas Jones Mercer solicitors. Financially, he could not continue to engage him any longer,

and therefore asked his uncle, Mr Dimaio, to help him with his claim. Mr Dimaio is a solicitor, and although not an employment law practitioner, had previous employment law experience, and was able to help.

17. I have had the benefit of listening to the oral evidence of the Claimant, Mr Brennan and Mr Dimaio, and I would state at this juncture that I found all three to be impressive witnesses.
18. The key date for the purposes of this issue was the 10 June 2021, the date that the ET1 is asserted to have been presented. I am satisfied on the evidence before me in regard the steps that were taken by the Claimant leading up then that at all times, he was mindful of the fact that the claim had to be presented at the tribunal by the latest 21 June 2021. The Claimant provides various copies of messages between himself and Mr Dimaio in relation to the completion of the ET1. Further, I am provided with copies of the documents in regard the arrangements for a conference with Counsel on Wednesday 9 June 2021 to finalise details of the ET1. In evidence the Claimant confirms, as does Mr Dimaio, that the ET1 was ready for presentation in early June 2021, the date referenced is the 3 June 2021.
19. The evidence is that the conference with Counsel was then cancelled but nevertheless, the Claimant and Mr Dimaio agreed that it would be prudent to proceed with presenting the claim.
20. Over the ensuing weekend, 5/6th June 2021, the Claimant attempted to submit the claim electronically but was unsuccessful in doing so. His written evidence in regard to this was clarified in oral evidence, in short, the reason that he could not submit it online was because of the number of words in the document, it exceeded 2500 words.
21. It was at this time that Mr Dimaio indicated that he would be working in Cardiff on Wednesday and Thursday, 9 and 10 June 2021, and he himself would attend at Cardiff Employment Tribunal office to present the ET1. As a result, Mr Dimaio and the Claimant met on the 9 June 2021 when he signed off the covering letter to accompany the ET1, the ET1 had already been signed. Mr Dimaio was then left with the documents to bring to the tribunal the next day.
22. Mr Dimaio's has been very clear in his evidence as to what happened on the date in question when he came to present the claim. To be able to gain access to the Cardiff Employment Tribunal office a person needs to be able to access the Magistrates Court building. Mr Dimaio states he was denied access to the building. The email dated 14 February 2022 from Wales ET confirms that at the time 'mitigations were in place for health and safety purposes and counters were closed', and those submitting documents were 'encouraged to submit electronically'.

23. Mr Dimaio's statement is self-explanatory as to the steps that he took, in short, after waiting for some time for the return of a security guard who it was considered may have been able to help him, and needing to return to work, he gave the A4 envelope containing the ET1 and covering letter to a postman, who, according to his evidence, was entering the building and going upstairs. The Tribunal office is situated on the third floor which is consistent with his evidence. Mr Dimaio states the envelope was clearly addressed to the Employment Tribunal office.
24. Mr Dimaio confirms that having done this he telephoned the Claimant to tell him the claim had been delivered, but that he, the Claimant, needed to check this with the tribunal office the following day.
25. There is then the text message (attached to the Claimant's statement) at 3.24 pm dated Friday 11 June from Mr Dimaio advising the Claimant to telephone the Tribunal.
26. Mr Brennan's telephone record dated 11 June 2021 shows a telephone call, which he states was made on behalf of the Claimant to the Tribunal at 3:33pm. The telephone number on the record it is not disputed is that of the Cardiff Employment Tribunal office.
27. The Respondent's assertion is that it was a short telephone call but nevertheless, the Claimant and Mr Brennan confirm that they were told by the individual spoken to, who would not disclose her name, that the ET1 had been received and that it had been stamped 10 June 2021.
28. Finally, there is then the message from the Claimant sent at 3:36pm to Mr Dimaio having made the telephone call stating, 'its all done noted handed it 10 July'.
29. I find this evidence to be compelling. As previously stated, I have had the opportunity to hear the Claimant and his witnesses all give evidence. I find the Claimant's explanation as to why he then did nothing having had this conversation with the tribunal office on the 11 June 2021 to be entirely reasonable. In short, why would he have? He had been told that his claim had been received, and had been stamped as received.
30. The next contact by the Claimant with the tribunal was on the 9 July 2021, contact which from the text messages disclosed was prompted by Mr Dimaio. I refer to the transcript at page 28 of the Claimant's statement. In summary, Mr Dimaio messaged the Claimant suggesting that he contact the tribunal. There is then a response from the Claimant as to the best time to do so, which Mr Dimaio replies to at 9.19am stating, 'doesn't really matter but time is going on'. The Claimant then responds to Mr Dimaio at 12.12pm stating that his response is 'exact same as the other week', and then sends a further message which refers to this being as a result of Covid.
31. Mr Brennan's evidence is that he made another telephone to the tribunal on behalf of the Claimant following that, however, he is not entirely sure as to when that call was

made. In any event, it was only then on the 23 August 2021 that it became apparent when the Claimant spoke to Mr Mark McGrath, of the Tribunal Office, that the tribunal did not have the ET1. I refer to the date 23 August 2021 because that is the date that has been given by Mr Dimaio as the date he then posted the copy that he had of the ET1 to Cardiff Employment Tribunal, which is stamped as received 24 August 2021.

### **Conclusion**

32. I do not intend to recite any further of the evidence. I am satisfied on the evidence before me that the ET1 was presented to the Cardiff Employment Tribunal Office on 10 June 2021, and that the Claimant/Mr Brennan were told on the 11 June 2021 when they contacted it, that it had been received and stamped as received.
33. Further, I am satisfied that when the Claimant telephoned the tribunal on the 9 July 2021, the tribunal confirmed that it had his claim and that it was awaiting processing. What transpired after that then remains an anomaly.
34. The Employment Tribunal like all other tribunals and courts has been seriously impacted on by Covid in their ability to process claims. It is public knowledge that there has been a substantial delay, and therefore, the Claimant's evidence that he did not contact the Tribunal office again until 23 August solely because he had been told that there was 6 to 8 week delay in processing claims, I find to be a reasonable explanation.
35. In summary, I find that the claim was presented in time and the date it was presented was 10 June 2021.

Judge MM Thomas

Date 23 February 2022

JUDGMENT SENT TO THE PARTIES ON 25 February 2022

FOR THE TRIBUNAL OFFICE Mr N Roche