



EMPLOYMENT TRIBUNALS

Claimant: William Kabati

Respondent: Mitie Limited

Heard at: London Central (by video)

On: 28 February 2022

Before: Tribunal Judge A Jack, acting as an Employment Judge

Representation

Claimant: In person

Respondent: Mr. Ishfaq Ahmed, counsel

RESERVED JUDGMENT

The judgment of the employment tribunal is that the tribunal does not have jurisdiction to consider the claim. The tribunal is satisfied that it was reasonably practicable for the claim to be presented within the normal time limit.

REASONS

Hearing

1. The purpose of the preliminary hearing, listed for 10 am, was to consider whether the tribunal has jurisdiction to hear the claim bearing in mind the statutory time limit.
2. The Grounds of Resistance stated that there was no explanation or acknowledgement by the Claimant of his failure to comply with the statutory time limit. In fact the Claimant had said at paragraph 15 of his ET1 Claim Form that he had completed a form that he thought was a claim form and had sent it by email to London Central in July 2021, and that he had not heard back. He had therefore rung and had been sent a link to apply. He said he was sorry for the delay.
3. On the morning of the hearing, while preparing for it, I asked the clerk to check if the Claimant had sent an email to London Central. She established that an email, with an attached ET1 Claim Form, had been received at 23:58 on 8 August 2021.

4. The email and the attached Claim Form were sent to both parties at 9:58 on the morning of the hearing. Both parties joined late and the hearing was adjourned until 10:50, so that they had an opportunity to consider the documents which had been sent to them that morning.
5. The Respondent had provided a bundle of 46 pages. (The email sent by the Claimant and the automated reply which he received were not in this bundle.) The Claimant gave oral evidence and was cross-examined.

Findings of Fact

6. The Respondent employed the Claimant as a security officer.
7. He was dismissed on 1 April 2021 and received pay in lieu of notice.
8. He notified ACAS on 7 June 2021 and ACAS issued a certification on 8 July 2021. The Claimant was aware that the deadline for presenting his claim was 8 August 2021, as he had been told this by ACAS.
9. He found a form online and when he had finished filling it in he could not see how to send it. The form did not have a submit button. He also found the Tribunal email address online, and sent his completed form by email.
10. He sent the email to London Central at 23:58 on 8 August 2021, attaching a Claim Form which was clear on its face that he was claiming for unfair dismissal.
11. He received an automated response, also on 8 August 2021. The Claimant's oral evidence was that this included thanks for his email, apologised for the delays in responding to emails due to the pandemic, said that the email would be dealt with as soon as possible, and said that hearings were by video and that he would be sent instructions.
12. As a result of the response, he believed that he should wait for the hearing. As he did not receive details about a hearing, he began ringing the Tribunal. He tried ringing a number of times but did not get through. When he did get through the person he spoke to could not find his Claim Form. She emailed him a link so that he could fill in a form, and asked him to explain on it why it was delayed.
13. He presented a second ET1 on 11 October 2021.
14. The Tribunal took no action in response to his first ET1. His first ET1 was not accepted or rejected.
15. However since the hearing I have researched the details given on Gov.uk about how to make a claim to an employment tribunal. This states that you can make a claim to the employment tribunal online and provides a link. Under the heading "Make a claim by post" there is a link enabling one to download and fill in a claim form, and postal addresses are given for where the completed form should be sent.
16. Since the hearing I have also researched the content of the automatic reply sent by the Tribunal. It is as follows (emphasis added):

“Thank you for your email. Please read the following carefully, London Central ET apologises that due to the pandemic and maintenance issues normal service has been significantly disrupted.

Delays in responding to emails:

Central London Employment Tribunal regrets any delay, your email has been received and will be dealt with as soon as possible.

Arrangements for hearings:

Most hearings will be by video although Victory House is now open. Hearings listed for “in person” are converted to video, you will be sent instructions on how to participate. If the hearing is to be in person at Victory House you will be told. Joining instructions for video hearings will be sent to the parties the afternoon before the hearing.

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New claims and ET3s

The ET is now accepting and serving new claims and the backlog is being cleared.

Please note that new claims (ET1 form) cannot be accepted by email. The quickest and easiest way to send us a claim form is by using our online submission service which you can access here: <https://www.gov.uk/employment-tribunals>. If you received an auto response then your claim has been filed, there is regrettably a considerable backlog of claims waiting to be processed.”

17. I am satisfied on the balance of probabilities that the content of the guidance on Gov.uk and of the automated response was the same at the material time. However if the Claimant has evidence suggesting that this is not the case, he may apply for a reconsideration.

The Law

18. A claim can only be started by presenting a completed (prescribed) claim form in accordance with any practice direction made under regulation 11: rule 8(1) of the Employment Tribunals Rules of Procedure.
19. Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 enables the President to make practice directions.
20. The Presidential Practice Direction *Presentation of Claims (2020)* provides that a completed (prescribed) claim form can be presented online by using the online form submission service, by post, or by hand.

21. In general, a failure to comply with a rule does not of itself render proceedings or any step taken in proceedings void. However that general Rule does not apply to a failure to comply with rule 8(1): rule 6.
22. The normal time limit for presenting a claim for unfair dismissal to a tribunal is set out in s. 111(2)(a) & (b) of the Employment Rights Act 1996 (ERA).
23. Section 111(2)(a) provides that a tribunal shall not consider a claim of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination.
24. In a case where an employee is dismissed without notice or with a payment in lieu of notice, the effective date of termination is the date on which that termination takes effect: s. 97(1)(b) ERA.
25. Section 111(2)(b) provides an exception. There are two limbs to this test. A tribunal may consider a claim presented outside the normal time limit, if it is satisfied that:
 - it was not reasonably practicable for the claim to be presented within the normal time limit; and
 - the claimant has presented it within such further period as the tribunal considers reasonable.
26. The normal time limit is extended by section 270B ERA to take account of the obligation to enter into early conciliation facilitated by ACAS.
27. In order to determine how the normal time limit will be extended by early conciliation, it is necessary to identify Day A and Day B and then apply the extensions in section 207B(3) and 207B(4). Day A and Day B are defined in section 270B(2). Day A is the day on which the prospective claimant initiates the early conciliation process and Day B is the date of the EC certificate issued when the process is concluded.
28. The extension under section 207B(3) applies in every case. It operates to "stop the clock" during the period in which the parties participate in EC as it provides that in working out when a time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted.
29. The additional extension under section 207B(4) only applies in certain circumstances, where the limitation date, as calculated by subsection 207B(3), falls in the period between Day A and one month after Day B.
30. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law (*Marks & Spencer plc v Williams-Ryan* [2005] EWCA Civ 470) confirms that the tribunal can take into account various factors such as:
 - the substantial cause of the claimant's failure to comply with the time limit;
 - whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;

- whether the claimant had been advised by anyone and the nature of the advice given;
 - whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.
31. A claimant's ignorance of (a) the right to bring a claim, or (b) how to make it or (c) the time limit for making it, will not automatically lead to a finding that it was not reasonably practicable for the claimant to present the claim in time. Where ignorance is a factor, the tribunal needs to be satisfied that the claimant's ignorance was reasonable in all the circumstances: *Marks & Spencer plc v Williams-Ryan*, paragraph 21.
32. If the first limb of the test under section 111(2)(b) is satisfied, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. This is a matter for the tribunal (*Wall's Meat Co Ltd v Khan* [1978] IRLR 499) bearing in mind the length of and circumstances of the delay.

Conclusions

33. The Claimant was dismissed on 1 April 2021 and paid in lieu of notice. The effective date of termination is therefore 1 April 2021.
34. Taking account of the date that ACAS was notified and issued a certificate, a claim for unfair dismissal had to be presented on or before 8 August 2021.
35. The Claimant sent an email to London Central attaching a claim in the prescribed form at 23:58 on 8 August 2021.
36. The Claimant was aware not only of his right to bring a claim, but also of the time limit, because he had been advised of the time limit by ACAS. He is however a litigant in person and was not aware that a claim could only be presented online using the online form submission service, by post, or by hand. I am satisfied that, had he been aware of the procedures for making a claim, he would have used the online form submission service rather than email, as indeed he did when provided with a link to the online service by the Tribunal.
37. The Claimant had not used one of the methods by which a completed claim form can be presented. An email to a regional office is not one of the methods by which a completed prescribed claim form may be presented.
38. He was however not aware of that when he sent his email. He believed that he had presented his claim within what he had been correctly told was the relevant period.
39. However I also need to consider whether the claimant's ignorance of the correct procedure was reasonable in all the circumstances. Given that there is easily accessible material available on Gov.uk about how to submit a claim form, which provides a link to the online submission form, and which enables one to download a claim form in order to submit it by post, I do not consider that the claimant's ignorance was reasonable. He was aware of his right to make a claim and of the deadline for doing so. He ought to have investigated how a claim could be made. For this reason, I do not consider his ignorance of the correct procedure to be reasonable.

40. Further, the second claim was not presented within a reasonable time after the expiry of the deadline. Once he received the automated response, the claimant should have realised that “new claims (ET1 form) cannot be accepted by email” and that he had therefore not yet made a claim using the correct procedure. The automated response sent to the Claimant was clear that new claims could not be accepted by email and that the quickest and easiest way to send the Employment Tribunal a claim form was by using the online submission service. A link to this service was given. Once the Claimant had received the automated response, his ignorance of the fact that claims could not be submitted by email and that there was an online submission service was even less reasonable in all the circumstances.
41. My decision is therefore that the tribunal does not have jurisdiction to consider the claimant’s claim. However as I noted above, if the claimant has evidence that the wording of the guidance on Gov.uk at the material time and of the automated response he received is not as I have outlined it above, he may apply for a reconsideration.

Tribunal Judge A Jack,
acting as an Employment Judge

18 March 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
21/03/2022.

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FOR EMPLOYMENT TRIBUNALS