



EMPLOYMENT TRIBUNALS

Claimant: Mrs H Costick

Respondent: Mark Collard, Gerald Eric Collard and Patricia Anne Collard trading as Disco Furnishings (A Partnership)

Heard at: Croydon (by CVP video) **On:** 15 February 2022

Before: Employment Judge Parkin

Representation

Respondent: Mr P Lonergan, Consultant

Claimant: Mr J Franklin, Counsel

JUDGMENT having been sent to the parties on 1 March 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The claim and response

By her claim presented on 8 December 2020 the claimant claimed unfair dismissal - that she was unfairly dismissed for redundancy on 10 August 2020 in circumstances where there was no redundancy situation and no proper consultation or procedure. At paragraph 14, the claimant set out: "This claim is submitted a month out of time. This is very much regretted and the claimant seeks the tribunal's discretion in allowing this claim to proceed. It has been slower to progress claims generally due to the current Pandemic and it is requested that this is kindly taken into account". The claimant had notified ACAS of Early Conciliation on 4 December 2020 with the EC Certificate issued the same day, 4 December 2020.

2. No response was presented initially but subsequently the respondent presented a response out of time on 30 December 2021 and was granted an extension of time for doing so on 3 February 2022. It contended that the claim had been presented out of time and that the claimant had been fairly dismissed for redundancy. At that time, this hearing was converted to a preliminary hearing consider whether the claim had been presented out of time.

3. The hearing

The hearing was held by CVP video. The respondent provided a main Bundle (B, 1-55) and a Supplementary Bundle (AB, 1-7). Both parties made representations, the claimant having provided a skeleton argument. She was not present and did not give evidence, nor was there any evidence from her then solicitors about advice given to her about time limits or their lack of resources and administrative difficulties during the Covid-19 pandemic.

3. The Issues

Whether the claimant presented her claim in time or, if not, whether it was not reasonably practicable for her to do so but she presented it within such further period as the Tribunal considers reasonable.

4. The facts

The Tribunal made the following key findings from the documentary evidence:

4.1 On 8 August 2020, the respondent provided the claimant with a notice of redundancy terminating her employment with effect from 10 August 2020 and notifying her she would not be expected to work her notice period (AB,1). It asked her to sign a copy of the letter and return it.

4.2 The claimant then sought clarification about the selection process and consultation, by letter dated 16 August 2020 (AB, 2).

4.3 The respondent replied to this on 19 August 2020 (AB,3), leading to the claimant signing the notice of redundancy on 22 August 2020 confirming she had read and understood its contents.

4.4 Payment of all outstanding sums was made to the claimant at the end of August 2020.

4.5 Between 1 October and 4 December 2020 there was correspondence between the claimant's solicitors and the respondent. First, on 1 October 2020, the claimant's solicitors wrote contending the dismissal was unlawful, which the respondent disputed by letter dated 13 October 2020 (AB,4).

4.6 The claimant's solicitors then wrote on 25 November 2020 expressly stating an Employment Tribunal would view the dismissal as unfair, seeking compensation

and threatening to refer the case to the tribunal and requesting a reply by 1 December 2020; this was a letter before action (AB,5-6).

4.7 The respondent replied on 4 December 2020, making no proposals and criticising the 6-week delay in correspondence from the solicitors (AB,7).

4.8 The claimant notified ACAS under the Early Conciliation provisions on 4 December 2020, when the Certificate was also issued.

4.9 She then presented her ET1 claim online on 8 December 2020. The narrative content at Box 8.2 was relatively brief and there was a short recitation of remedy sought at Box 9.2 (B3-14 at 9-10).

5. The parties' submissions

It was common ground that the effective date of termination was 10 August 2020. The respondent urged that the primary limitation period expired on 9 November 2020, so the claim was already out of time when Early Conciliation notification was made on 4 December 2020. The respondent wrote to the solicitors on 13 October 2020 in reply to their letter dated 1 October, but they replied only on 25 November 2020 when the claim was already outside the primary limitation period (AB, 5-6). They called it “a straightforward claim” and gave until 1 December 2020 for a response, whilst threatening to commence proceedings. The claim could readily have been presented online; it was not acceptable for the solicitors to hide behind the pandemic and lockdown when businesses including solicitors were continuing to operate. It was plainly “feasible” to present the claim in time, but, in any event, 8 December 2020 was not a reasonable further period after time expired.

6. The claimant contended that the Tribunal was dealing with a wholly exceptional period in history. 9 November 2020 fell within a second lockdown announced out of the blue, when it had earlier been understood there would be no further lockdown and the process was severely impacted by this. The claimant had put her faith in solicitors who needed to react in exceptional circumstances, which took this outside the Dedman principle. It was not the case that where a claimant consulted a skilled adviser they could never argue it was not reasonably practicable to present the claim in time – see the EAT judgment in Northants CC v Entwistle UKEAT/0540/09 at paragraph 9. Here it was not reasonably practicable for her to present her claim by 9 November 2020 due to the unforeseen impact of Covid-19 on staffing levels at her then solicitors, real communication difficulties and the impact of the second lockdown at the time. A tiered system was introduced in England on 14 October 2020 followed by a full lockdown from 31 October which lasted until 2 December 2020. The claim was submitted swiftly after the Early Conciliation certificate was issued. The Tribunal should exercise its discretion in favour of the claimant, particularly where the respondent was given 10 months to present its response, otherwise there would be no equality of arms; she should not be penalised for events entirely beyond her control.

7. The Law

The statutory provisions for the purposes of this preliminary hearing are in the Employment Rights Act 1996. By Section 97:

- (1) Subject to the following provisions of this section, in this Part “the effective date of termination”—
 - (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
 - (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect...

- (2) Where—
 - (a) the contract of employment is terminated by the employer, and
 - (b) the notice required by section 86 to be given by an employer would, if duly given on the material date, expire on a date later than the effective date of termination (as defined by subsection (1)), for the purposes of sections 108(1), 119(1) and 227(3) the later date is the effective date of termination.

- (3) In subsection (2)(b) “the material date” means—
 - (a) the date when notice of termination was given by the employer, or (b) where no notice was given, the date when the contract of employment was terminated by the employer.

By Section 111:

- (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... And by Section 207B:
 - (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.

8. This time limit issue goes to the Tribunal's jurisdiction to consider the claim. The Tribunal needs to determine the effective date of termination when the time limit begins to run. If the claim is presented out of time, the burden of proof rests on the claimant to establish first that it was not reasonably practicable to present the claim in time - which is something different from whether it was reasonable for her to have done so or indeed whether it was physically possible for her to have done so – and then that it was presented within such further period as the tribunal considers reasonable. Whilst there has been extensive case law over the years, the principles have long been established. The first limb of whether it was or was not reasonably practicable to present it in time is a question of fact for the Tribunal, as established by the Court of Appeal in Wall's Meat Co Ltd v Khan [1979] ICR 52, and confirmed in Palmer v Southend-on-Sea Borough Council [1984] ICR 372. The individual and their professional advisers are taken together and a time limit which is missed because of faulty advice to a claimant from such an adviser does not provide a basis on which time will be extended: this is the principle in Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA (although in an appropriate case the Tribunal will still enquire into the reasonableness of the adviser's mistake or ignorance of the time limit).

9. Conclusion

The parties agreed that the effective date of termination was 10 August 2020; the Tribunal found this was so where the claimant was effectively dismissed forthwith, with pay in lieu of notice. Accordingly, the primary time limit expired on 9 November 2020. Since date A and date B were the same, no days during Early Conciliation do not count and there was no section 207(4) extension as the primary time limit had already expired. The claim was presented almost a month out of time.

10. The Tribunal was not greatly assisted by the EAT judgment in Entwhistle, a case where the employer had told its former employee that he had three months to present a claim to the Tribunal when rejecting his appeal against dismissal when he only had six weeks, because the contract of employment was not extended during the period before his appeal was heard. The claimant's solicitors then failed to advise him as to the proper time limit. There is no suggestion here of the respondent misleading the claimant about the time limit for presenting a claim and

no evidence of what advice, if any, the claimant's solicitors gave her about time limits.

11. Although the claimant in her claim form, skeleton argument and oral submissions sought the discretion of the Tribunal to extend her time for presenting the claim, this is a mistaken approach. Unlike the out of time provisions governing discrimination claims in the Tribunal, there is no overriding judicial discretion to extend time where it is just and equitable to do so. Reasonable practicability is a more restrictive test.

12. The claimant engaged solicitors to act on her behalf in respect of her dismissal and she was entitled to rely upon their expertise. Businesses including legal professionals carried on at work during the Covid-19 pandemic, with working from home (which was once out of the ordinary) having become commonplace during lockdown and taking instructions, alongside acting for clients and advising them taking place by phone and email when face-to-face meetings were impossible. The vast majority of employment claims nowadays are presented online rather than by post or hand delivery; that was the method adopted on the claimant's behalf later and it was entirely feasible for the claim to be presented on time in that way. In all the circumstances, the claimant has not established that it was not reasonably practicable for her claim to be presented in time. Furthermore, had it not been reasonably practicable to present it in time, the further delay to 8 December 2020 was not a reasonable further period.

13. Accordingly, the Tribunal has no jurisdiction to consider the claimant's unfair dismissal complaint and it is dismissed.

Employment Judge Parkin

Date: 16 March 2022

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employmenttribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.