



EMPLOYMENT TRIBUNALS

Claimant: Mrs C MacKenzie (deceased)

Respondent: Pointon and Sempringham Parish Council

Heard at: Nottingham (remotely) **On: 3 May 2022**

Before: Tribunal Judge McTigue, acting as an Employment Judge

Representation

Claimant: Mrs P Keeley

Respondent: Mr A Macmillan (Counsel)

JUDGMENT

1. The judgment of the tribunal is that:

1.1 The claim was brought outside the three month time limit;

1.2 It was reasonably practicable for the claim to be presented before the end of the three month time limit;

1.3 The claim is dismissed in its entirety.

REASONS

Introduction

- 1 The claimant was dismissed from her employment on 7 March 2021. She brings a claim of unfair dismissal.
- 2 In its response form the respondent asserts that the tribunal does not have jurisdiction to hear the claim because the claim is time barred. In an email dated 17 February 2022 the respondent made an application for strike out under Rule 37 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 on the basis that the Tribunal do not have jurisdiction to hear the claim as it was presented out of time.

- 3 In a letter dated 7 March 2022 Employment Judge Clarke ordered that the Telephone Case Management Hearing on 3 May 2022 should be converted to an Open Preliminary Hearing to consider whether the claim was presented out of time and if so, whether time should be extended on the grounds it was not reasonably practicable to present it in time and the time within which it was presented was itself a reasonable period of time.
- 4 The claimant passed away on 7 April 2022. Prior to her death, the claimant wrote a letter of authority dated 4 April 2022 which authorised Mrs Pamela Jayne Keeley to act as her appointed representative in these proceedings. This letter also made clear that Mrs Keeley was to follow the case to its conclusion in the event of the claimant's death.

Issues

- 5 The issues to be decided were as follows:
 - 5.1 Could Mrs Keeley continue the proceedings on behalf of the claimant?
Both parties had no objection to the Employment Tribunal exercising its discretion under section 206(4) of the Employment Rights Acts 1996 appointing Mrs Keeley as an appropriate person and providing her with the ability to continue the claim on behalf of the claimant. Consequently, the tribunal appointed Mrs Keeley as an appropriate person. The Tribunal does not intend to say much more about that.
 - 5.2 Was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
 - 5.3 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

Procedure

- 6 The Tribunal heard submissions from Mrs Keeley, on behalf of the claimant, and Mr Macmillan, on behalf of the respondent. No bundle was in existence for the hearing and so the Tribunal had regard to the relevant documents on file, in particular an email dated 20 February 2021 from the late Mrs McKenzie where she set out in detail the reasons why her claim was not presented in time.

Findings

- 7 The claimant, Mrs McKenzie, was employed primarily as a Clerk for the respondent. She commenced employment with the respondent on 1 April 2020. Her employment was terminated on 7 March 2021 following a breakdown in the employment relationship. Thus, 7 March 2021 was the effective date of termination.
- 8 As this point, it should be noted that the limitation date for any unfair dismissal claim presented by the claimant was 6 June 2021.
- 9 The claimant engaged in ACAS early conciliation on two occasions. The first notification was made on 3 August 2021 and the certificate was issued on 9 August 2021. The second notification was made on 27 October 2021

and the certificate was issued on 29 October 2021. As both occasions were after the limitation date for an unfair dismissal claim they could not extend time by means of section 207B Employment Tribunals Act 1996.

- 10 The claimant commenced employment tribunal proceedings against the respondent on 6 December 2021 for Unfair Dismissal. As the claimant's proceedings suggest that the dismissal was for an automatically unfair reason, the two year qualifying period necessary to commence an unfair dismissal claim, under section 108 Employment Rights Act 1996, does not apply.
- 11 The proceedings were however commenced some six months late as the Claimant's claim form was received by the employment tribunal on 6 December 2021. The claim was not therefore made to the Tribunal within three months of the effective date of termination.

Submissions

- 12 The claimant's representative agreed that the contents of the claimant's email dated 20 Feb 2022 were correct. Consequently, the submissions built on the reasons provided in that email. It was submitted that the claim was out of time due to:
 - 12.1 the claimant's desire to appeal against her dismissal;
 - 12.2 the claimant's desire to avoid putting the respondent parish council to the cost of proceeding to a full employment tribunal hearing;
 - 12.3 the difficulties present due to remote working and the inability to hold in person meetings as a consequence of the COVID-19 pandemic.
- 13 When asked for clarification on a number of issues, the claimant's representative informed the Tribunal that the claimant was aware they had the ability to commence Tribunal proceedings within a few days of the date of their dismissal. The claimant's representative also informed the Tribunal that the claimant had also made contact with ACAS at the end of 2020 in order to seek informal advice about the possibility of bringing a claim against the Respondent at that point in time.
- 14 Mr Macmillan submitted that whilst the reasons advanced by the claimant were laudable, they were not valid reasons to extend time for the purposes of the law. He referred us to the following cases: *Marks and Spencer plc v Williams-Ryan* [2005] EWCA Civ 470; *Palmer and anor v Southend on Sea BC* [1984] I.C.R. 372 and *Asda Stores Ltd v Kauser* EAT 0165/07.

Law

- 15 Unfair dismissal proceedings must be started within time limit set out in section 111 of the Employment Rights Act 1996. This 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.”

If a claim is out of time and cannot be brought within the escape clause contained in section 111(2)(b) Employment Rights Act 1996 then the tribunal must refuse to hear the case.

16 By reference to the IDS Employment Law Handbook Employment Tribunal Practice and Procedure at paragraph 5.41 the following is recorded:-

‘When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

- S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a ‘liberal construction in favour of the employee’ — *Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA*
- what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in *Wall’s Meat Co Ltd v Khan 1979 ICR 52, CA*: ‘The test is empirical and involves no legal concept. Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a lawyer’s complications into what should be a layman’s pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the [employment] tribunal, and that their decision should prevail unless it is plainly perverse or oppressive’
- the onus of proving that presentation in time was not reasonably practicable rests on the claimant. ‘That imposes a duty upon him to show precisely why it was that he did not present his complaint’ — *Porter v Bandridge Ltd 1978 ICR 943, CA*. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — *Sterling v United Learning Trust EAT 0439/14.*’

17 In *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372* the Court of Appeal decided that that the words ‘reasonably practicable’ in section 111(2)(b) Employment Rights Act 1996 do not mean reasonable, which would be too favourable to employees, and do not mean physically possible, which would be too favourable to employers, but means something like ‘reasonably feasible’. In the Employment Appeal Tribunal case of *Asda Stores Ltd v Kauser EAT 0165/07* Lady Smith stated that, ‘the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done’.

18 As to effect of any appeal against dismissal, the Employment Appeal Tribunal decided in *Bodha v Hampshire Area Health Authority 1982 ICR 200* that the existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. This view was expressly approved by the Court of Appeal in *Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372*.

Conclusions

- 19 In the circumstances, the Tribunal has to consider whether it was reasonably practicable for the claimant to bring the claim within the time limit and, if not, whether the claim was presented within such further period as the tribunal considers reasonable.
- 20 The Tribunal's decision is that it was reasonably practicable for the claim to be presented in time. Mrs McKenzie was clearly aware that she had a potential claim for unfair dismissal within days of her dismissal. Her representative confirmed this before the Tribunal and, in addition, Mrs MacKenzie's email of 20 February 2022 states that she had contacted her local District Council within days of her dismissal and stated that it was her intention to pursue the matter formally if resolution could not be reached.
- 21 The claimant was clearly computer literate. She was able to communicate with the Employment Tribunal via email and it also appears she had the technical ability to fill in the Employment Tribunal claim form using a computer. In addition, the claimant's representative told us that their primary sole means of contact with the claimant was online via a computer rather than face to face. As a consequence of this, the Claimant would have been able to research her employment rights and, in particular, ascertain the time limit for commencing an unfair dismissal claim. The Claimant was also clearly aware of ACAS. Her representative informed the Tribunal that the Claimant had previously made contact with ACAS at the end of 2020 in order to seek informal advice about the possibility of bringing a claim against the Respondent at that point in time.
- 22 The fact that Mrs MacKenzie wanted to appeal her decision is not sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. The lodging of Mrs MacKenzie's claim with the Employment Tribunal was clearly not dependent on the internal appeals procedure having been commenced.
- 23 The existence of the Covid-19 pandemic is also not sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit. During the pandemic, it was still possible for Claimants to submit claims to the Employment Tribunal and for such claims to be heard.
- 24 Consequently, it was reasonably practicable for the claimant to present her claim within the three month time limit. As such this claim must be dismissed in its entirety.

Tribunal Judge McTigue, acting as an Employment Judge

16th May 2022 _____

Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE