EMPLOYMENT TRIBUNALS

Claimant: **Miss Charlotte Dudman**

Respondent: **Euro Garages Ltd**

Heard at: **South London ET via CVP** **On:** **25 July 2022**

Before: **Employment Judge G. King**

Representation
Claimant: Mr. M. Dudman – Claimant's father
Respondent: Ms. S. Ashberry – Solicitor

JUDGMENT

1. The Claimant's claim was submitted out of time and the Employment Tribunal has no jurisdiction to hear this claim.

2. The Claimant's claim is dismissed

REASONS

Background

1. This is a Preliminary Hearing to decide the issue of whether the claim has been brought in time.

2. The matter was dealt with on submissions by the parties and no witness evidence was heard.

3. The Tribunal was assisted by a bundle of 180 pages. Where documents from the bundle are referred to, the page number is denoted in [square brackets].

Issues

4. The issues before the tribunal are:

    a. Was the Claim form (ET1) presented with in three months of the Effective Date of Termination ("EDT"), allowing for the additional time for ACAS Early Conciliation?
    b. If not, was it reasonably practicable for the Claimant to have done so?
    c. If not, was it presented within a reasonable time?

Findings of Fact

5. The Claimant was employed by the Respondent as a shift supervisor from 5 February 2018.

6. The Claimant resigned from the Respondent by way of a letter dated 22 April 2021 [32]. This letter states "I am resigning from my position of shift supervisor with immediate effect."

7. The Claimant entered into ACAS Early Conciliation on 23 April 2021.

8. ACAS Early Conciliation ended on 4 June 2021 with the issue of a certificate by ACAS.

9. The Claimant issued her ET1 [2 – 13] on 4 November 2021.

The Law

10. The relevant section of the Employment Rights Act 1996 ("ERA") is section 111, which states:

    111. Complaints to employment tribunal.

    (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.

Discussion

11. The EDT is not in dispute between the parties. Mr. Dudman, on behalf of the Claimant, raises that the Respondent's HR Department did not realise or recognise that the Claimant had resigned until 4 June 2021, but he confirmed that the Claimant's last day of work was 22 April.

12. I am also guided by *Fitzgerald v University of Kent at Canterbury* 2004 ICR 737, CA and *Horwood v Lincolnshire County Council* EAT 0462/11.

13. The upshot of these cases is clear: once the employment has come to an end, it is not open to the parties to decide to rewrite history and treat the employment as having ended on a date other than that on which it actually did end. The EDT is a statutory construct that depended on "what has happened between the parties over time", and not on what they might agree to treat as having happened, or unilaterally think might have happened.

14. In light of the above, I conclude that mistakes and erroneous conduct by either party cannot alter the statutory EDT.

15. I am also guided by *Calor Gas Ltd v Dorey* EAT 651/97, in which an employee actually continued to work beyond the date of the EDT. The EAT held that this did not alter the EDT.

16. I therefore conclude that the Claimant's EDT was 22 April 2021, meaning that the Claimant needed to submit her ET1 or enter into the ACAS EC process by 7 July 2021. The ACAS Early Conciliation period extended this date by 42 days to 31 August 2021.

17. The Tribunal must now turn to whether it was reasonably practical for the Claimant to have submitted her claim within this time. The meaning of 'reasonably practical' was considered in *Asda Stores Ltd v Kauser* EAT 0165/07, where it was explained in the following words: "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. It is noted that the Respondent never received the original ET1 and therefore filed the ET3 out of time. The ET3 and Grounds of Resistance [16 – 25] were accepted by the Tribunal. The Respondent accepts that it may seem unfair to the Claimant that the Respondent was allowed to file its Grounds of Resistance late, but now contests the timing of the Claimant's application. I accept that this may look unfair and that there is 'one rule for one, one rule for another', however, that is precisely the case. The Tribunal is considering the Claimant's late presentation of her ET1 and this is governed under the provisions of s.111 of the ERA as set out above. The late response from the Respondent is not a relevant consideration in this case.

19. The onus of proving that presentation in time was not reasonably practicable rests on the Claimant (see *Porter v Bandridge Ltd* 1978 ICR 943, CA).

20. Mr. Dudman explained that the Claimant found the process stressful and confusing and so he had been assisting her. He explained that neither he nor the Claimant knew the legal process and were unaware of time limits. He cited that it was very difficult to get advice owing to the COVID-19 pandemic. The Claimant's partner contracted COVID which effectively prevented Mr. Dudman from going to the Claimant's house. Mr. Dudman then got COVID himself in August 2021, and his partner contracted COVID in September 2021. Mr. Dudman also raised that the Claimant had been told not to proceed without formal advice, but that the Claimant and him had been unable to get any such advice.

21. In *Porter v Bandridge Ltd* 1978 ICR 943, CA, the majority of the Court of Appeal ruled that the correct test is not whether the Claimant knew of his or her rights but *whether he or she ought to have known of them*. A similar conclusion was reached in *Avon County Council v Haywood-Hicks* 1978 ICR 646, EAT. The Respondent cites the wording and the tone of the Claimant's letter of resignation [32] and says this is demonstrative that the Claimant knew about constructive dismissal and her employment rights. Mr. Dudman submits that this letter was a standard template from the internet and the words used in it cannot be used to imply that the Claimant knew anything about her right to make a claim for unfair dismissal. I reject that argument. The Claimant, and Mr. Dudman, were clearly aware of the concept of constructive unfair dismissal because, even if they used a standard template letter from the internet, they knew what to search for and where such information could be obtained.

22. In *Trevelyans (Birmingham) Ltd v Norton* 1991 ICR 488, EAT, it was held that, when a Claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right. Failure to do so will usually lead the Tribunal to reject the claim. See also *Sodexo Health Care Services Ltd v Harmer* EATS 0079/08; *Partnership Ltd v Fraine* EAT 0520/10; and *Koudriachova v University College London* EAT 0132/14.

23. A debilitating illness may prevent a Claimant from submitting a claim in time. The Claimant's case is that when her family members contracted COVID she was prevented from having face-to-face meetings with her father and this is the reason for the delay. There is, however, no evidence that the Claimant nor her father, who was assisting her, were ill for the whole duration of the time limit, and that the illness prevented the Claimant from submitting the claim on time. (See *Pittuck v DST Output (London) Ltd* ET Case No.2500963/15). The submission of the Claimant's ET1 is an online process and would not require her to leave her house nor have any face-to-face meetings.

24. I understand the Claimant's point that the COVID-19 pandemic put a strain on businesses and organisations offering advice. I do not accept, however, that it was not reasonably practical for the Claimant to have submitted her ET1 within the required time limits. As she or her father were able to submit the claim themselves on 4 November 2021, I conclude that they were able to submit a claim without assistance. I can find no reason as to why it would not be practical to submit the claim by 31 August 2021.

25. Even if it was not reasonably practical for the Claimant to submit her ET1 by 31 August 2021, I note that the ET1 was not submitted until 4 November 2021. For the same reasons given above, I find that the delay of over two months means that the ET1 was not submitted within a reasonable period.

26. While I can understand and appreciate the difficulties faced by the Claimant, the law at s.111 ERA is clear. A claim must be submitted within three months of the EDT unless it is not reasonably practical to do so. There is no provision for what is just and equitable. The Claimant may find this harsh, but it is the role of the Tribunal to apply the law as it stands.

Conclusion

27. Accordingly, I find that the claim was submitted out of time, and the Employment Tribunal therefore has no jurisdiction to hear this claim.

28. The claim is therefore dismissed.

Employment Judge G. King
Date: 25 July 2022