



EMPLOYMENT TRIBUNALS

Claimant: Ms R Warwick

Respondent: Rochdale Boroughwide Housing LTD

HELD AT: Manchester (by cloud video platform) **ON:** 22 September 2022
BEFORE: Employment Judge Ficklin

REPRESENTATION:

Claimant: In person
Respondents: Ms D Taylor, HR executive

JUDGMENT

1. On 22 September 2022, I gave judgment that the Employment Tribunal does not have jurisdiction to hear the claimant's claim for constructive dismissal, and for failure to provide a written statement of reasons for dismissal, because the claim is out of time. Those claims are dismissed.

REASONS

2. This case was listed for an open preliminary hearing to consider whether the Claimant's complaints were made out of time and if so whether they should be dismissed on the basis that the Tribunal has no jurisdiction to hear them.
3. At the hearing, the claimant represented herself. The respondent was represented by Ms Taylor. The claimant gave evidence and was briefly cross examined. I then heard submissions both representatives. I had a written statement from the claimant, and the ET1 and ET3.
4. At the end of the hearing, I dismissed the claimant's claims as being out of time and gave reasons orally. The claimant later requested written reasons.

Issues

5. Was the unfair dismissal made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:
 - 5.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination?
 - 5.2. If not, 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?

Legal framework

Time limits

6. Section 111 of the Employment Rights Act 1996 provides that a claim regarding unfair dismissal shall not be considered unless it is presented within 3 months of the event potentially giving rise to liability ie the termination of the employment, or 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.
7. Anyone wishing to present a claim to the Tribunal must first contact ACAS so that attempts may be made to settle the potential claim, (s18A of the Employment Tribunals Act 1996). In doing so, time stops running for the purposes of calculating time limits within which proceedings must be issued, from, (and including) the date the matter is referred to ACAS to, (and including) the date of a certificate issued by ACAS to the effect that settlement was not possible was received, (or was deemed to have been received) by the Claimant. Further, if the certificate is received within one month of the time limit expiring, time expires one month after the date the Claimant receives, (or is deemed to receive) the certificate. See s207B of the Employment Rights Act 1996 and *Luton Borough Council v Haque* [2018] UKEAT/0180/17.

The Reasonably Practicable Test

8. The question of whether it was reasonably practicable to bring a claim in time is a question of fact for the Tribunal. The onus is on the Claimant to show that it was not reasonably practicable, (*Porter v Bandridge Ltd* [1978] ICR 943 CA).
9. The expression, “reasonably practicable” has been held to mean, “reasonably feasible” applying common sense. See *Palmer v Southend Borough Council* 1984 IRLR 119 CA.’. Lady Smith in *Asda Stores Ltd v Kauser* EAT 0165/07 explained it 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”
10. In *Wall’s Meat Co. Ltd v Khan* [1979] ICR 52 Brandon LJ said:

“The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents,

or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of a complainant ...”

11. As to whether the time between expiry of the time limit and the issue of the claim is a reasonable period calls for an objective consideration of the factors causing the delay, viewed against the background of the expiry of the primary limitation period and strong public interest in claims being brought promptly. See *Cullinane v Balfour Beatty Engineering Services Ltd and anor* EAT 0537/10.
12. In *Stratford on Avon District Council v Hughes* EAT 0163/20 the EAT overturned a tribunal’s finding that it was ‘not reasonably practicable’ for the claimant to have presented his claim in time where he had not received the ACAS certificate by the expiry of the relevant limitation period. The Claimant was dismissed on 29 March 2019 and contacted ACAS on 25 June 2019. ACAS informed him on 2 August 2019 that the employer did not wish to continue with the conciliation process and emailed him a certificate that day. However, the claimant did not receive the certificate. Under S.207B(4) ERA, the primary limitation period expired on 2 September 2019. By the time the claimant had obtained a copy of the certificate and presented his claim, on 5 September 2019, it was three days out of time. An employment tribunal extended time on the basis that it had not been reasonably practicable for the claimant to have presented his claim in time because he needed the ACAS certificate in order to lodge the claim.
13. The EAT found that this reasoning was flawed. The question that the tribunal should have asked was whether, in all the circumstances, it would have been reasonably practicable for the claimant to have obtained the ACAS certificate sooner, not whether he behaved reasonably in waiting until after the expiry of the primary limitation period to contact ACAS. The concept of ‘reasonable practicability’ involves a heavier onus than just behaving reasonably but is not to be equated with what is physically possible.

Findings of fact

14. The claimant was employed as a Human Resources and Systems Analyst from 6 October 2014 to the date she left, which she claims is a constructive dismissal, on 31 October 2021.
15. The claimant is dyslexic and it affects her work. The respondent accepts this. I also accept it and made my decision bearing it in mind.
16. The claimant says that she contacted ACAS on 14 December 2021. She says that being inexperienced in these matters she assumed that the matter was progressing. She says that was given to understand ACAS would take 6-10 weeks to process her claim, so she did not take any further action until February 2022.
17. The claimant contacted ACAS on 4 February 2022 and was told that there was no record of her claim. She lodged her claim with ACAS on that day. Her ACAS certificate was issued on 9 February 2022 and she lodged her claim on 10 February 2022. The claim was not made within three months of the termination of employment.

18. There is no evidence of the claimant's contact with ACAS on 14 December 2021. The claimant works in information technology and said that her dyslexia was not the reason that her claim was delayed.

Conclusions

19. The test that I must apply is whether it was reasonably practicable for the claim to be lodged in the 3 months. The test is stringent.
20. I understand the caselaw to mean that the issue is not whether a mistake was made at some point that delayed the claim past the deadline, but whether overall, there were good reasons why the claim was not lodged in time and so the late claim should be allowed.
21. The caselaw interprets the test strictly. All the circumstances are relevant. I take into account that the claimant is dyslexic. But there is no evidence that the claimant's dyslexia directly caused the problem at all. The claimant said that her background is in IT, and she has been employed in positions that use IT routinely. I take into account that the claimant said that she wanted to settle into her new position, gather evidence and recover from the stress of her former position, but even the first attempted application was made well into the 3-month period.
22. In all the circumstances, the evidence does not show that it was not reasonably practicable for the claimant to lodge the claim in time. That the Claimant made a genuine mistake is relevant, though there is no physical evidence of that, but overall that one mistake does not justify extending time. I find that the tribunal does not have jurisdiction to hear the claim and it is struck out for being outside the time limit.

Employment Judge Ficklin
22 March 2023

SENT TO THE PARTIES ON
27 March 2023

FOR THE TRIBUNAL OFFICE

Notes:

- (1) This judgment follows a hearing that took place partly on a remote video platform. Neither party objected to the format of the hearing.