Neutral Citation Number: [2023] EAT 8

Case No: EA-2022-000068-AT

EMPLOYMENT APPEAL TRIBUNAL

Rolls Building
Fetter Lane, London, EC4A 1NL

Date: 12 January 2023

Before :

HIS HONOUR JUDGE JAMES TAYLER

- -

Between :

B.L.I.S.S RESIDENTIAL CARE LTD	**Appellant**
- and -	
TERESA EILEEN FELLOWS	**Respondent**

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- -

Daniel Brown (instructed by Ashfords LLP) for the **Appellant**
Peter Doughty for the **Respondent**

Hearing date: 12 January 2023

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JUDGMENT

SUMMARY

UNFAIR DISMISSAL, PRACTICE AND PROCEDURE

The employment tribunal erred in law in holding that it had not been reasonably practicable for the claimant to submit her claim within the primary time limit. Appeal allowed, and judgment dismissing the claim as out of time substituted.

HIS HONOUR JUDGE JAMES TAYLER:

1. This is an appeal against the judgment of Employment Judge Rayner. The hearing was held on 26 October 2021. The judgment was sent to the parties on 11 January 2022.

2. EJ Rayner held:

> The claim was filed outside the three-month time limit, but it was not reasonably practicable for the claim to have been filed within time, and it was filed within a reasonable time, so that time is extended. the claim is in time and the ET had jurisdiction to hear the claim.

3. The time limit for a complaint of unfair dismissal is provided for by section 111 **Employment Rights Act 1996** ("**ERA**")

> 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.
>
> (2A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

4. I shall refer to the initial period of three months (plus any addition because of ACAS early conciliation) as the primary time limit and, where it was not reasonably practicable for the complaint to be presented before the end of the primary time limit, the further period within which it is reasonable to submit the complaint as the extended time limit.

5. The permissible methods for submitting a claim to the employment tribunal are set out in the Presidential Practice Direction, Presentation of Claims dated 2 March 2020 ("the Presidential direction").

6. The facts are taken from the judgment of the employment tribunal. The respondent is a provider of residential care. The claimant was employed as a service manager by the respondent from 2 July 2007 until her dismissal with effect on 8 October 2020.

7. The claimant wished to bring a claim of unfair dismissal. The claimant instructed solicitors to deal with her potential claim. The claimant instructed solicitors, Glanville's Legal Services ("Glanville's"). Her claim was dealt with by Miss Rolls, a solicitor, who was recently qualified, and was dealing with her first claim in the employment tribunal. The claim arose during the Coronavirus pandemic when there were considerable administrative difficulties for Glanville's and the employment tribunals. Miss Rolls was working from home and there were some limitations on her supervision.

8. The claimant contacted ACAS on 4 January 2021. An early conciliation certificate was issued on 20 February 2021.

9. Miss Rolls miscalculated the time limit. Miss Rolls believed the claim had to be submitted by 13 February 2021, considerably earlier than the correct date for the expiry of the primary time limit. It is common ground between the parties that on a correct calculation, the primary time limit expired on 10 March 2021.

10. Miss Rolls did not consider the Presidential direction before submitting the claim to the Employment Tribunal. The claim was submitted by post to the Regional Office in Bristol. EJ Rayner stated:

> 16. Miss Rolls said in her evidence before me that she believed that she had sent the claim form to the correct postal address. I accept that this was her belief and I find as fact that there was no reason for her to check the address once the claim form had been sent.
>
> 17. I also accept the submission made on behalf [of] the respondent that the claimant, a qualified solicitor, can be expected to know what the presidential direction says in respect of the correct manner of filing a claim to the employment tribunal. Miss Rolls made a mistake and as a solicitor she is held to a higher professional standard than an unrepresented party would be.

11. I consider that on a proper reading of the judgment EJ Rayner concluded that Miss Rolls incorrectly believed that sending the claim form to Bristol was a permissible form of service, rather

than thinking that she had sent it to the Leicester office, which would have been a permissible form of service. Submission by post to Bristol was not one of the permissible methods to submit the claim form.

12. Miss Rolls heard nothing further until she received a letter dated 10 March 2021. It appears the letter was received that day, presumably as an attachment to an email, as it was common ground that Miss Rolls could have immediately submitted the claim online, and it would have been received by the employment tribunal within time.

13. The employment judge held that as a qualified solicitor, Miss Rolls could be expected to know what the Presidential direction said in respect of the correct manner of submitting a claim form. Miss Rolls resubmitted the claim form by post, rather than electronically, with the consequence that it was received on 12 March 2021, outside of the primary time limit. Miss Rolls said that she was "unfamiliar" with the process. At paragraph 28 EJ Rayner held that Miss Rolls' mistake in filing the claim again by post was "not unreasonable".

14. EJ Rayner directed herself that the test was whether it was reasonably practicable for the claim to have been submitted within time. There was a relatively lengthy self-direction as to the relevant law.

15. The key authority for the purposes of this appeal is **Dedman v British Building & Engineering Appliances Ltd** [1974] ICR 53, at 61E to F. The relevant authorities were summarised by Underhill LJ in **Lowri Beck Services Ltd v Brophy** [2019] EWCA Civ 2490 at paragraph 12. Paragraph 12.4 sets out the approach to be taken when a skilled adviser, such as a solicitor, is instructed in employment tribunal proceedings. Any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee.

16. Paragraph 12.4 of **Lowri Beck Services** was referred to by the employment judge. Consideration was also given to authorities about situations in which errors were made in respect of ACAS early conciliation numbers and fees (when the fees regime was in place) which were not of assistance in analysing this case.

17. I was referred to **Software Box Ltd v Gannon** [2016] ICR 148, which concerned the resubmission of a complaint by a party who was not represented. I was also referred to **Adams v British Telecommunications plc** [2017] ICR 382, which concerned an incorrect ACAS certificate number being inserted because two digits were missed off by a claimant in the presence of a solicitor. I do not consider those authorities take the matter any further. What the employment judge had to consider in this case was whether the mistakes made by Miss Rolls were reasonable or unreasonable. Even if this was her first employment tribunal claim, Miss Rolls is a solicitor who held herself out as competent to deal with employment tribunal litigation.

18. The employment tribunal considered the statutory framework for presentation of a claim to the employment tribunal. The relevant provisions are section 11 of the **Employment Tribunal Act 1996** which enables the making of practice directions. Rule 7 of the **Employment Tribunal Rules 2013** ("**ET Rules")** provides for Presidential guidance. Rule 8 **ET Rules** provides for the presentation of a claim to the employment tribunal in the following terms:

> (1)A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.

19. Rule 8 **ET Rules** makes it clear that it is mandatory that a claim form be presented to the employment tribunal in accordance with the Presidential direction, which at paragraph 5 sets out the only permissible means by which a claim can be submitted.

20. The employment judge suggested that the Presidential direction was not binding (see paragraph 51). The Presidential direction is, in fact, binding because by operation of Rule 8 **ET Rules**, submission of a claim can only be made in accordance with the Presidential direction.

21. EJ Rayner stated that she had sympathy for Miss Rolls. EJ Rayner stated that Miss Rolls' mistake had been to send the claim form to the wrong postal address, thereafter there had been no reason to consider that the claim had not been properly submitted until the letter was received by Miss Rolls stating that the claim form had not been properly instituted because it had been sent to an incorrect address. The employment judge took note of the difficulties caused by the Coronavirus

pandemic for solicitors and the employment tribunal staff. EJ Rayner concluded that it had not been reasonably practical to submit the claim within the primary time limit and it had thereafter been submitted within the extended time limit, in that the delay beyond the primary time limit had been reasonable.

22. The grounds of appeal cover three main areas. In Ground 1 the respondent disputes any suggestion that Miss Rolls thought that the claim form had been sent to the correct address. It was not suggested at this hearing that Miss Rolls thought she had sent the claim form to Leicester. She knew that the claim had been sent to Bristol. It was asserted that she believed that posting the claim form to Bristol was an appropriate means of submission.

23. By Ground 6 it is asserted that an irrelevant factor was taken into account, the fact that Miss Rolls was newly qualified and was submitting a claim to the employment tribunal for the first time. The employment tribunal expressed sympathy for Miss Rolls as a newly qualified solicitor. One cannot but have some sympathy for Miss Rolls, and I do not see there is anything wrong in the employment tribunal stating that it had such sympathy.

24. The key Grounds are 2 to 5 which all assert, in slightly different ways, that the employment tribunal either misapplied the statutory test or did not properly consider whether the failure to submit the claim form as required by the Presidential direction within the primary time limit was unreasonable when done by a solicitor. It is also asserted that the decision of the employment tribunal was perverse.

25. I am fully satisfied that the decision of the employment tribunal cannot stand. Miss Rolls made three fundamental errors in dealing with this claim. Firstly, she miscalculated the primary time limit. Initially, that was of no particular importance because she thought she had less time to submit the claim form than she did. This mistake was relevant once she was informed that the claim form had not been properly submitted and had to decide how to resubmit the claim. She should have appreciated that she could still submit it within the primary time limit. Secondly, Miss Rolls submitted the claim form to the wrong postal address. Thirdly, when the claim form was returned, she failed to

resubmit it online which would have meant it was received within the primary time limit.

26. I find the tribunal's reasoning a little hard to fathom. The tribunal stated that Miss Rolls, as a solicitor, could be expected to know what the Presidential direction said. That was obviously correct. Accordingly, in the circumstances of this case, it could not be reasonable of her to fail to submit the claim form in one of the methods set out in the Presidential direction. Either the employment judge failed properly to consider whether there had been unreasonable action on the part of a skilled adviser, or she reached a determination that was perverse, in the sense of being one that was not open to an employment tribunal on the facts of this case.

27. I cannot see how the employment judge could have concluded that once the letter was received by Miss Rolls informing her that the claim had not been properly presented, she acted reasonably in re-submitting the claim by post. The letter referred to electronic submission first as a method by which a claim form could be sent to the employment tribunal. When Miss Rolls realised that the claim form had not been properly presented it was incumbent on her to carefully check the relevant provisions, including the primary time limit and the Presidential direction.

28. The employment judge stated at paragraph 28 that the method of refiling was not unreasonable. The claim was still within time and the question was whether it was reasonably practicable for Miss Rolls to submit it that day. There was nothing which prevented her from doing so. As a solicitor, she should have been able to check the methods of submitting a claim form including online submission, which was referred to in the letter returning the original claim form.

29. Alternatively, it was urged upon me by the respondent that paragraph 28 was a slip of wording and what was really meant by it being stated that submitting the claim form by post was not “unreasonable" was that it was not reasonably practicable for the claimant to submit the claim form in any other way. Were that the proper reading, I would conclude that the decision of the employment judge was perverse, in the sense of being one that no reasonable employment tribunal could reach. No reason has been advanced as to why the claim form could not have been re-submitted online.

30. The fundamental errors were in failing to properly calculate the primary time limit in the first

place and in not reading and complying with the Presidential direction. There was nothing in the circumstances of this case that meant that the failure to do so was reasonable even in the case of a recently qualified solicitor submitting a claim to the employment tribunal for the first time. All practitioners must submit their first claim form. They can be expected to take especial care in doing so. A client is entitled to expect that of a legal advisor. One necessarily has some sympathy for someone who makes a mistake at the start of their career. However, before accepting instructions to act in an employment tribunal claim, a solicitor should know how to calculate the time limit for the submission of a claim and how it is to be submitted. A new solicitor might not be expected to know the finer points of employment law, but any professional adviser should know those basic points.

31. The fact that this was the first time Miss Rolls had filed a claim in the Employment Tribunal is not a factor that could properly be held to render it reasonable for her to be unaware of the time limit or of how the claim form was to be submitted. The Coronavirus pandemic did not prevent her making herself aware of the time limit or the permitted methods of submission. The information is easily available on the internet.

32. Accordingly, I allow the appeal.

33. I consider that there is only one possible outcome. The claim was not submitted within the primary time limit because of an unreasonable error on the part of a skilled legal adviser. It was reasonably practicable for the claim to have been submitted within the primary time limit and, accordingly, the claim must be dismissed.