



# EMPLOYMENT TRIBUNALS

**Claimant:** Miss E Mashingo

**Respondent:** Best Time Limited

**Heard at:** Southampton

**On:** 27 July 2023

**Before:** Employment Judge Rayner

## Representation

Claimant: Did not attend

Respondent: Miss A Robinson , Counsel

# JUDGMENT

1. The Claimant failed to bring her claims of
  - a. Unfair dismissal
  - b. Automatic unfair dismissal contrary to section 103A ERA
  - c. Wrongful dismissal
  - d. Unpaid holiday paywithin the time limits set out within section 111 and/or section 23 Employment Rights Act 1996.
2. It was reasonably practicable for the claimant to have filed each of the claims within the statutory time limit in each case.
3. The Claimant's claims of
  - a. Unfair dismissal
  - b. Automatic unfair dismissal contrary to section 103A ERA
  - c. Wrongful dismissal
  - d. Unpaid holiday pay

Are therefore each claim is struck out for want of jurisdiction.

## Reasons

### The relevant legal principles

1. A complaint to a tribunal of unfair dismissal has to be presented in accordance with s. 111 of the Act;

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*“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 a further period as the tribunal considers reasonable in a case where it is satisfied that he was not reasonably practicable for the complaint to be presented before the end of that period of three months.”*

2. The legal test is therefore a hard one to meet on the face of the wording of the Act. It requires me to consider whether it was reasonably feasible for the claim to have been issued in time. I am entitled to take a liberal approach (*Marks & Spencer-v-Williams-Ryan* [2005] EWCA Civ 470 and *Northamptonshire County Council-v-Entwhistle* [2010] IRLR 740), but I nevertheless have to apply the wording of the statute to the facts.

3. The question of what is or is not reasonably practicable is essentially one of fact for the employment tribunal to decide. The leading authority as to the test to be applied is the decision of the Court of Appeal in *Palmer and Saunders-v-Southend-on-Sea Borough Council* [1984] 1 All ER 945, [1984] IRLR 119, [1984] ICR 372, CA. May LJ proposed was a test of 'reasonable feasibility'.

*"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done..... Perhaps to read the word "practicable" as the equivalent of "feasible"..... and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."*

4. The possible factors are many and various, and as May LJ stated, cannot be exhaustively described, for they will depend on the circumstances of each case. He nevertheless listed a number of considerations which might be investigated (at [1984] IRLR at 125 and [1984] ICR at 385). These included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time. In order to make findings of fact, the claimant will need to lead some evidence as to why she was not able to, or did not, file her claim within time.

5. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the tribunal, (as the Court of

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Appeal said in *Schultz-v-Esso Petroleum Ltd* [1999] 3 All ER 338, [1999] IRLR 488) to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'.

6. It would not be reasonably practicable for a claimant to issue a claim until they are aware of the facts giving him or her grounds to apply. It is not usually an excuse, however, for a claimant to argue that they were not aware of their right to bring a claim. The reasonableness of their state of knowledge would have to be considered. There is an obligation upon a claimant to take reasonable steps to seek information and advice about the enforcement of their rights.
7. If it was not reasonably practicable to present the claim time, the tribunal may allow an extension, but only for such a further period as is considered reasonable. A consideration of that issue generally involves similar considerations to the threshold test.
8. The claimant made claims of unfair dismissal; automatic unfair dismissal for whistle blowing; wrongful dismissal in respect of notice and unpaid holiday pay.
9. A case management hearing took place before employment Judge Roper on the 9 March 2023. At that hearing, EJ Roper summarised the background to the claim, and discussed the question of when the Claimant's employment had terminated. In her claim form the claim had suggested that this was January or February 2022 or possibly April 2022. The claimant clarified that her employment had ended at the end of January 2022 and not, as she had suggested in her claim form in April 2022. This was recorded in the case management order and from the case management order it is clear that the information was recorded *because* the claimant had provided it to the employment tribunal and for no other reason.
10. Following the case management hearing the Respondent wrote to the employment tribunal, making an application that the claimants claim should be struck out because the tribunal did not have jurisdiction to hear the claims as they had all been brought outside of the primary time limits. The correspondence was copied to the claimant and on the 21 March 2023 of the claimant wrote back to the employment tribunal stating as follows:

*further to the submission of respondent's amended response and application for an order to strike out the claim provided by the respondent's representative on the 20th of March 2023 I the claimant commit to provide a written objection to the respondent's application to the tribunal within the next two working days.*

*I have provided in my ET1 that initially that the perspective date of the end of my contract of employment was April 2022. I was not provided a written notice for reason of dismissal or notice of dismissal procedures in all the date and the reasoning behind the dismissal was never in any form provided neither to me, the judge, nor was the information sent to the*

*appropriate HMRC. I do hold specific information ( ie RTI sent out to the HMRC) showing I was still employed and on the respondents payroll in February 2022 these will be included in my evidence file .*

11. The tribunal heard nothing further from the claimant and in particular did not receive any detailed response in respect of the strike out application and nor was any further information or evidence sent into the employment tribunal.

12. On the 11 April 2023, the claimant wrote to the employment tribunal stating as follows:

*I the claimant was forced to delay submission of my written objection to the respondent's amended response and application due to an urgent and unexpected hospitalisation. I still wish to submit my objection and I commit to do so by the 17 of April 2023. The medical documentation from the incident is available upon request should it be needed.*

13. No further information was received from the Claimant by the 17 April 2023.

14. On 25 April 2023, the parties were sent notification of a preliminary hearing to determine whether the claimant's claims were presented within time and whether the tribunal has jurisdiction to hear them. It was listed for the 11 July 2023 at 10:00 AM. Case management orders were made for the parties to agree a bundle of documents by the 20 June 2023 and for the claimant to provide a written witness statement addressing the issues if she intended to give evidence, which was to be sent to the respondent by 4 July 2023. These documents would be to be provided to the employment tribunal at least 48 hours before the commencement of the hearing.

15. I accept the respondent's submissions that in fact no further documentation of any kind was sent by the claimant to the respondent and I also accept that this was despite the respondent contacting the claimant and asking for further information to include in a bundle of documents.

16. The respondent produced a bundle of documents for the hearing on 27 July 2023 which assisted the court.

17. On Wednesday 28 June 2023 the claimant sent an e-mail to the employment tribunal stating *further to my communication with the Bristol civil and family justice centre I would like to report that I the claimant will not be able to attend the preliminary hearing scheduled for this case due to medical treatment I am receiving during this time. I will provide my availability to attend the hearing by the end of this week when approved by the medical team.*

18. On the 10 July 2023, the day before the preliminary hearing the Claimant sent an e-mail to the employment tribunal in which she stated

*I was advised to continue my treatment until the 20 September 2023 and I intend to follow the medical team's advice. Should there be a need for me to provide the paperwork confirming the treatment received before the*

*date I will certainly do so please be informed this may occur with a delay due to my accessibility to electronic devices during my treatment.*

19. The respondent contacted the claimant the same day asking her to send across her medical evidence, providing reasons for why she was unable to attend the preliminary hearing. They noted that they had had no previous correspondence from her informing them of a medical condition.
20. The information provided was provided late in the day following notification of the PHIP in April 2023. Whilst no specific application for an adjournment had been made, the information sent by the claimant was considered and a decision was taken to adjourn the hearing listed for the 11 July 2023 and re list it for the 27 July 2023.
21. The respondent applied for an unless order on these 17 July 2023, the parties were notified of the change in the date of the hearing.
22. On the 25 July 2023 the Claimant wrote to the employment tribunal attaching what she said was a medical certificate and a translation of the document. She stated *the treatment I'm receiving has been agreed with my GP and doctors and is administered in a stationary fashion due to its nature stop she says I was not granted a pass to leave the facility safely due to the severity of the symptoms and the possibility of suffering and epilepsy attacking the process I have already contacted my GP and the medical team I've worked with so far to provide the judge with a letter about my condition as well as the limitations imposed by it.*
23. She then said *I do consider these documents confidential and do not wish for the respondent to be included in the correspondence on the details of my health and well-being should it be the judges decision I do wish to be informed of such necessity.*
24. The claimant provided a short statement headed *certificate* which states the claimant *is currently getting treatment from 5 June 2023 until: still right requires medical treatment and rehabilitation .*
25. The claimant provided limited medical information and indicated that she did not wish it to be provided to the respondent. I discussed this with the respondent counsel who attended at this hearing on her own. She gave an undertaking to the court that she would not share any medical information provided today with her lay client, but rightly stated that the general rule is that any correspondence and information sent to the employment tribunal should also be sent to the respondent.
26. At the hearing I considered the claimant's correspondence as an application to adjourn the hearing all be it that no specific application had been made. the respondent objected to any adjournment and the employment judge considered all matters and then determined not to adjourn the hearing. the reasons for that decision are set out in the case management order which was sent to the parties following the hearing on the 27 July 2023.
27. I then heard submissions from the respondent in respect of their application to strike out the claimants claims on grounds that she had filed

all her claims out of time and the tribunal therefore had no jurisdiction to hear them.

28. I made the following findings of fact, on the basis of the documentation provided to me at this hearing and in the absence of any sworn evidence from either side.
29. The claimant had previously confirmed at a case management hearing that her employment terminated at the end of January 2022. Assuming the last day of employment as the 31st of January 2022 the claimant needed to contact ACAS by the 30 April 2022 at the very latest.
30. The claimant contacted ACAS on the 7 May 2022 and was issued with an ACAS certificate on the 10 May 2022. she then filed her claim to the employment tribunal on the 8 June 2022.
31. The claimant has had ample opportunity to explain to the tribunal why she did not file her claim contact ACAS within the primary time limit, and has also had ample time to provide any information or evidence she wanted taken into account in respect of any argument she may have that it was not reasonably practicable for her to have filed her claim at an earlier stage.
32. The claimant has failed to provide any information at all in this respect despite stating on a number of occasions that she would do so.
33. Whilst the claimant states that she is now unable to attend at hearings because of a medical condition she has never suggested for example that she had a medical condition or was incapacitated by reason of any medical conditional disability during the time between January 2022 and June 2022 when she filed her claim.
34. The Claimant was already over the primary time limit when she went to the ACAS, and she bears the burden of proving to the employment tribunal that it was not reasonably practicable for her to have filed her claim at an earlier stage.
35. in the absence of any statement or evidence from the claimant in respect of this matter I cannot conclude that it was not reasonably practicable. The claimant has not satisfied the tribunal of the legal test and I therefore determine that her claims of unfair dismissal, automatic unfair dismissal and Detriment for making a public interest disclosure; breach of contract; holiday pay and unlawful deductions from wages are all made outside the primary limit of three months and are struck out for want of jurisdiction.

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Employment Judge Rayner

Date 8 February 2024

JUDGMENT SENT TO THE PARTIES ON  
19<sup>th</sup> February 2024

FOR THE TRIBUNAL OFFICE

Note

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.