EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr C Roche	**v**	**Royal Mail Group Ltd**

Heard at: London Central (by video)

On: 15 April 2024

Before: Employment Judge **P Klimov** (sitting alone)

Representation:

For the claimant: **Mr Ian Taylor**, union representative

For the respondent: **Ms Zakia Tahir**, solicitor

JUDGMENT having been announced to the parties at the hearing on 15 April 2024, and written reasons having been requested by the respondent on 15 April 2024, in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. This hearing was a preliminary hearing (in public) to determine whether the Tribunal has jurisdiction to consider the claimant's claim pursuant to s.111(2) ERA.

2. On 17 January 2024, EJ Brown issued various case management orders in preparation for the hearing, including, by 10 weeks from 17 January 2024, for the claimant "*to submit a written statement, setting out his evidence regarding when he brought his claim, whether it was presented late, why he did not bring his claim earlier and why he says the Tribunal should extend time for his claim."*

3. At the hearing, the claimant was represented by Mr I Taylor, his trade union representative, and the respondent by Ms Z Tahir, a solicitor. I was referred to various documents in a 74-page bundle, the parties submitted in evidence.

4. The claimant submitted his witness statement on the morning of the hearing, together with one additional one-page document. His witness statement was short – 22 paragraphs. I adjourned the hearing for 15 minutes to allow Ms Tahir to consider the statement and make her representations whether it should be allowed to be admitted in evidence in light of its late submission. Upon returning to the hearing, Ms Tahir confirmed that the respondent had no objections to allowing the claimant's witness statement. I allowed it in evidence. The claimant was then sworn in and cross-examined by Ms Tahir on his witness statement.

5. Upon hearing the claimant's evidence and closing submissions by Mr Taylor and Ms Tahir, I announcement my judgment with reasons orally. I issued a written judgment on the same day, however it might not have yet reached the parties.

The Facts

6. The claimant was employed by the respondent, as an Operational Postal Grade (a postman), from 11 September 1978 until 26 April 2023, when he was dismissed for alleged gross misconduct.

7. Early conciliation started on 19 May 2023 (Day A) and ended on 13 June 2023 (Day B). The present claim form was presented on 5 October 2023. Accordingly, upon the application of s.207B of the Employment Rights Act 1996, the end date of the primary 3-month time limit was 19 August 2023 (25 July 2023 (3 months less one day from 26 April 2024) + 25 days (the period beginning with the day after Day A and ending with Day B). Therefore, on the face of it, the claim was submitted 48 days out of time.

8. However, the claimant's evidence, which I accept, is that following receipt of the ACAS early conciliation certificate on 13 June 2023, he promptly (within the primary 3-month time limit) submitted his ET1 online and received a submission reference number (222023588500). However, it appears that something had gone wrong with the processing of his claim form by the Tribunal. The claimant did not receive the standard Acknowledgement of Claim letter, and no case number had been assigned to his claim.

9. In September 2023, the claimant approached his trade union representative to enquire whether his claim was handled as part of a larger running dispute between the respondent and the trade union, and, as other similar cases, - stayed pending the outcome of an independent review by Lord Faulkner.

10. The union representative asked the claimant for his claim's case number. The claimant gave the submission reference number. His union representative said that there should be a different number, the case number, and advised the claimant to speak with the Tribunal to get his case number.

11. Shortly after that, in late September – early October, the claimant called the Tribunal and was told that, although the Tribunal recognised his details from the submission reference number, it could not find any records of a registered case number against that reference number.

12. The person at the Tribunal, with whom the claimant spoke on the phone, told the claimant to re-submit his claim form, which the claimant did online on 5 October 2023. He received a new submission reference number (2202358600). The claim form ("**the second ET1**") was processed by the Tribunal, and on 2 November 2023 the standard Acknowledgment of Claim letter was issued to the claimant with the assigned case number: 2215285/2023.

The Law

13. Section 111 of the Employment Rights Act 1996 ("**ERA**") 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.*

Application of Section 111(2)(b)

14. The following key rules can be derived from the authorities:

    a. s.111(2)(b) ERA "*should be given a liberal interpretation in favour of the employee*" — *Marks & Spencer Plc v Williams-Ryan* [2005] EWCA Civ 470, [2005] I.C.R. 1293, [2005] 4 WLUK 376.

    b. what is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. Lord Justice Shaw said 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….*".

c. 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.

d. if an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in his or her case, the question is whether that ignorance or mistake is reasonable. When assessing whether ignorance or mistake are reasonable, it is necessary to take into account any enquiries which the employee or his or her adviser should have made - *Lowri Beck Services Ltd v Brophy* 2019 EWCA Civ 2490, CA

e. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented "*within such further period as the tribunal considers reasonable*".

Meaning of 'reasonably practicable'

15. 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*".

16. In ***Wall's Meat Co Ltd v Khan*** Brandon LJ explained it in the following terms: "… *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 … or the impediment may be mental, namely, the state of mind of the complainant of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him*." (Pages 60F-61A)

17. The focus is accordingly on the claimant's state of mind viewed objectively.

18. In *Software Box Ltd v Gannon* 2016 ICR 148, EAT, the EAT said that, as a matter of principle, the fact that a complaint was made within time and then rejected did not and should not preclude consideration of whether the tribunal should have jurisdiction in respect of a second claim on the same ground. S.111 ERA required consideration of the complaint which was made, as and when it was presented. Referring to ***Wall's Meat Co Ltd v Khan***, the EAT

stated that the focus should be on what was reasonably understood by the claimant and whether, on the basis of that understanding, it was not reasonably practicable for her to bring the second claim earlier.

19. The EAT revisited this question in *Adams v British Telecommunications plc* 2017 ICR 382, EAT, confirming that the focus in such a situation must be on the second claim, and that the fact that the claimant was able to present an ET1 within time does not preclude the discretion being exercised. The question for the Tribunal, in those circumstances, was not whether the mistake she originally made was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances.

Analysis and Conclusion

20. As I stated above, I accept the claimant's evidence that he had submitted his original ET1 containing the present complaint of unfair dismissal within the 3-month time limit. I have no good reasons not to accept his oral evidence. Ms Tahir did not challenge the truthfulness of the claimant's evidence in cross-examination, either.

21. Furthermore, in his ET1 the claimant provided the following additional information in box 15:

"i am computer illiterate and having help filling this form in , i had tried myself in June and thought it was ok , my union asked for application number of case as all cases against Royal Mail were put on stayed until December , i was given a case number 222023588500 , i called the tribunal and they cant locate my claim so asked me to restart my claim again which i have done and would like the tribunal judge to understand my predicament and concerns, my mental state with stress and anxiety have taken its toll with looking after my brother and losing my job and would ask for compassion in these circumstances on your timescales , thank you."

which further supports his oral evidence.

22. Having submitted his original ET1 in June 2023 within the primary limitation period, there was simply no reason for the claimant to submit his second ET1, until he was told by the Tribunal in late September/early October that his original ET1 could not be located and that he needed to re-submit his claim. Therefore, until the claimant came to understand that his original ET1 had not been properly registered by the Tribunal, it was not reasonable to expect him to submit the second ET1. There was no need for him to do that.

23. The fact that the claimant did not receive the standard Acknowledgement of Claim letter from the Tribunal after he had submitted the original ET1, in my view, is not sufficient for me to conclude that it was reasonable to expect the claimant to submit his second ET1 before 19 August 2023.

24. Firstly, delays of several weeks, and sometimes several months, in processing by employment tribunals of submitted ET1s are, unfortunately, not

unusual. Secondly, the claimant's evidence, which I accept, is that at that time he thought that his claim had been included in the pool of similar conduct dismissal cases and stayed pending the outcome of Lord Faulkner's review. Therefore, it was not unreasonable for the claimant not to enquire with the Tribunal about the status of his claim until after he had had the conversation with his trade union representative in late September – early October 2023.

25. I, therefore, find that it was not reasonably practicable for the claimant to submit his second ET1 before the end of the period of three months beginning with the effective date of termination.

26. Although the claimant could not recall the exact date when he called the Tribunal and was told that his original ET1 could not been found and that he needed to re-submit the claim, it was, on his evidence, which I accept, in late September – early October.

27. Importantly, the claimant's evidence, which I accept, is that he submitted his second ET1 promptly after that call. He submitted the second ET1 on 5 October 2023.

28. I find that in the circumstances the claimant submitted his second ET1 within a reasonable period after the expiry of the primary 3-month time limit, because he did that promptly after being told by the Tribunal to re-submit his claim.

29. For all these reasons, my overall conclusion is that although the claim was not presented within the primary 3-month time limit, it was not reasonably practicable for the claimant to do so. However, the claim was presented within a further reasonable period. The claim will therefore proceed.

Employment Judge Klimov

21 April 2024

Sent to the parties on:

25 April 2024

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For the Tribunals Office

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https://www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/