EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Nnanna Emole	v	Cygnet Mental Hospital

RECORD OF A PUBLIC PRELIMINARY HEARING

Heard at: Watford (by CVP)
On: 4 July 2024
Before: Employment Judge Alliott

Appearances
For the Claimant: In person
For the Respondent: Ms A Fadipe (counsel)

JUDGMENT

The judgment of the tribunal is that:

1. The claimant's claim was not presented in time and it was reasonably practicable to present it in time. Accordingly the claimant's claim is dismissed as there is no jurisdiction to hear it.

2. The respondent's application for costs is dismissed.

REASONS

1. This preliminary hearing was listed by Employment Judge Lewis on 27 February 2024 to determine:

> "Whether the tribunal can hear the claim which has been presented out of time, and if so, the judge will case manage."

The law

2. S.111 Employment Rights Act 1996 provides:-

> "111 complaints to employment tribunal
>
> (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 or three months."

3. Section 207B (Extension of time limits to facilitate conciliation before institution of proceedings) may extend the three month primary limitation period.

4. As per the IDS Handbook Practice and Procedure at 5.46:-

"When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:

- Section 111(2)(b) ERA should be given a "liberal construction in favour of the employee" – Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53, CA

- What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. An appeal will not be successful unless the tribunal has misdirected itself in law or has reached a conclusion that no reasonable tribunal could have reached. As Lord Justice Shaw put it in Walls Meat Co Ltd v Khan [1979] ICR 52, CA:

  "The test is empirical and involves no legal concept. Practical common sense is the key note and legalistic footnotes may have no better result than to introduce a lawyer's complications into what should be a layman's pristine province. These considerations prompt me to express the emphatic view that the proper forum to decide such questions is the employment tribunal, and that their decision should prevail unless it is plainly perverse or oppressive."

- 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] ICR943, CA. Accordingly if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable – Stirling v United Learning Trust EAT 0349/14

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."

5. And at 5.48:-

"In Palmer and another v Southend-on-Sea Borough Council [1984] ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that "Reasonably practicable" does not mean reasonable, which would be too favourable to employees, and does not mean physically impossible, which would be too favourable to employers, but means something like "reasonably

> feasible". 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."

6. And at 5.88:-

> "A debilitating illness may prevent a claimant from submitting a claim in time."

7. And at 5.89:-

> "Employment tribunals will usually expect to see medical evidence if illness is relied on as a reason for extending the time limit, particularly if the claimant has taken legal advice and was aware of the limitation period. Such evidence must not only support the claimant's illness, it must also demonstrate that the illness prevented the claimant from submitting the claim in time."

The facts

8. This preliminary hearing began on 9 May 2024. As part of the notice of the preliminary hearing Employment Judge Lewis had directed that the parties should exchange lists of relevant documents by 26 March 2024 and exchange witness statements by 9 April 2024. Unfortunately, the claimant failed to comply with either of those case management orders.

9. At the hearing on 9 May 2024 the claimant gave evidence before me and I asked him to explain why it was that he presented his claim late. The claimant referred to being ill with his "head banging". He stated that he recovered in about July and that it was then that he submitted a claim form by post to CPP Leicester. He told me that it was rejected due to errors or missing pages. The claimant read to me a letter from Leicester indicating that his claim form had been received by post on 18 September 2023 and sent to Watford. That tallies with the claim form which is date stamped 18 September 2023 by Watford Employment Tribunal.

10. In the circumstances I adjourned this hearing to allow the claimant to put in a witness statement and supporting documentation dealing with medical evidence of any illness and the details of the attempt to send the claim form by post to Leicester prior to 18 September 2023.

11. The claimant has put in a statement contained in a letter. Attached to the statement is a screenshot of some medication that he has been placed on.

12. The claimant's letter does not deal with any attempts to send his claim to Leicester by post prior to 18 September 2023 and does not exhibit any medical evidence suggesting a debilitating illness that would have prevented him submitting his claim in time. The claimant's statement relates to blood pressure which in my judgment was not a debilitating illness. The claimant's statement references the shock at becoming unemployed and bereavement consequent upon his mother-in-law's death.

13. The chronology of this matter is as follows:

- 23 January 2023: Claimant dismissed.

- 7 February 2023: Claimant's appeal meeting.
- 14 February 2023: Appeal rejected.
- 21 February 2023: Acas notified.
- 31 March 2023: Date of early conciliation certificate
- 30 May 2023: Last day for the claimant to present his claim.
- 18 September 2023: Presentation of the claim – 3 months 19 days late

14. The claimant told me that prior to notifying Acas he had taken advice from the Hayes Citizen's Advice Bureau and Acas and was made aware of the three month time limit to bring his claim. Consequently, ignorance of the time limit or his rights are not relied upon.

15. It is notable that the claimant was able to take advice from CAB and Acas and was able to notify Acas of his claim. The claimant's illness did not prevent him doing those acts.

16. Taking into account all the circumstances, in my judgment it was reasonably practicable for the claimant to have presented his claim in time. Consequently, the claim is dismissed as there is no jurisdiction to hear it.

Application for costs

17. The respondent has made an application for costs. Rule 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 provides as follows:_

> "When a costs order or a preparation time order may or shall be made.
>
> 76.—(1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
>
> (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
>
> (b) any claim or response had no reasonable prospect of success;"

18. Section 84 provides as follows:-

> "Ability to pay.
>
> 84. In deciding whether to make a costs … order, and if so in what amount, the Tribunal may have regard to the paying party's … ability to pay."

19. In my judgment the bringing of the claim out of time and the claimant's attempt to justify this by maintaining that it was not reasonably practicable to have presented it in time and that he had presented it within a reasonable time thereafter was not unreasonable conduct. Further, I do not consider that the claimant's contentions that it was not reasonably practicable to bring his claim within time had no reasonable prospect of success.

20. I do consider that the claimant's conduct in failing to comply with the case management orders for a witness statement and/or documentation prior to the preliminary hearing on 9 May 2024 was unreasonable. In my judgment, when the claimant raised issues that might have been relevant to whether or not it was reasonably practicable to present the claim in time, that hearing had to be adjourned. Consequently, in my judgment, the claimant's unreasonable conduct caused this second preliminary hearing to have to be listed.

21. Going from the respondent's costs schedule, in my assessment the costs that flow from the adjournment would reasonably be represented by counsel's brief fee, £600, and one hours preparation time by the respondent's solicitors, £398.

22. Having concluded that the claimant's conduct of part of the proceedings was unreasonable I must consider whether to make a costs order and I have a discretion as to whether or not I do so.

23. I have taken into account the claimant's ability to pay. In plain terms the claimant told me that he has no money, is not in receipt of any state benefits, does not have a job and, in effect, lives off his wife's earnings. In the circumstances I have concluded that an order for costs against him would not be in the interest of justice.

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Employment Judge Alliott

Date: 17 July 2024

Sent to the parties on: 23 August 2024

For the Tribunal Office

Recording and Transcription

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