EMPLOYMENT TRIBUNALS

Claimant **Ms Shaun Burns**

Respondent **Waymarks Limited**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL
AT A PUBLIC PRELIMINARY HEARING

HELD AT NEWCASTLE by Cloud Video Platform (" CVP")
On 16 November 2020
EMPLOYMENT JUDGE GARNON
Appearances
For Claimant did not connect
For Respondent Ms L Veale of Counsel

JUDGMENT

The claim was presented outside the time limit prescribed for doing so in circumstances where it was reasonably practicable for it to be presented within time. The Tribunal cannot consider the claim which is hereby dismissed.

REASONS (bold is my emphasis and italics are quotaions)

1. The claim presented on 26 August 2020 after Early Conciliation (EC) from 26 June to 20 July 2020 ticked the box for unfair dismissal only. The claimant was dismissed without notice for gross misconduct orally on 22 April confirmed in writing by email the next day.

2. A response dated 10 June from Trower and Hamlins Solicitors sets out the respondent's case well and takes the point the claim is out of time. On initial consideration under Rule 26 Employment Tribunal Rules of Procedure 2013 (the Rules), on 30 September 2020 Employment Judge Aspden issued an order that unless the claimant explained the late issue of his claim it would be dismissed.

3. The claimant replied on 6 October

I was dismissed in the middle of a pandemic with no job and a police investigation preventing me from getting a job in the career that I have dedicated almost ten years to so I had to seek a new career so I have been studying rail engineering I have been caring for grandparents who almost died through Covid and I have been trying find solicitors to take my case on a no win no fee basis as I have nothing at all. I could not get anyone to take the case as the money I could potentially get is not enough in their eyes to take it on so I have to represent myself. I do not have the time and resources of a law firm.

*Also, **I received my appeal decision on June 2nd so I thought I had 3 months from then** since Waymarks made me wait over a month for an appeal hearing and then another week for my decision.*

***For the sake of 6 days and with a hearing already in place please do not dismiss my case** I have not done anything wrong and my life is ruined.*

As for the email I have just received please be aware I am not a trained solicitor I sent an email to the wrong person I made a mistake.

4. In reply, Trower and Hamlins wrote
The Claimant has indicated his claim was issued out of time because of the coronavirus pandemic. The Respondent submits this is not sufficient justification as to why it was not reasonably practicable for the Claimant to issue his claim in time.
The Claimant engaged in early conciliation between 26 June and 20 July 2020, during the pandemic, clearly demonstrating he was able to take action regarding his employment dispute despite the pandemic.
The early conciliation certificate was issued to the Claimant via email, which suggests he has access to the internet, and is able to correspond via email, therefore the Claimant could have issued his claim online within the time period.
Further, the Claimant had plenty of time after his early conciliation certificate was issued to him before his limitation date would expire (one month later) in which to issue the claim to the Tribunal, therefore if he did not have access to a computer during this period, he had time in which to issue his claim via post, however he failed to take this action.
As such, the Respondent submits the Claimant has not demonstrated it was not reasonably practicable for him to issue his claim within the limitation period. The Respondent therefore submits that the Tribunal does not have jurisdiction to hear the Claimant's claim, and respectfully requests that the claim be struck out.

5. Employment Judge Johnson ordered a hearing by CVP. Rule 47 says if a party fails to attend or to be represented at the Hearing, the tribunal may dismiss the claim or proceed with the hearing in the absence of that party. Before doing so it shall consider any information which is available to it after any enquiries that may be practicable about the reasons for that party's absence. Because parties do occasionally have problems connecting to CVP, I asked the clerk to telephone the claimant's mobile . It was switched off.

6. The issues to be decided at this hearing are
(a) whether the claim was presented before the end the relevant time limit?
(b) if not, was it reasonably practicable for it to have been?
(c) if not, was it presented within a reasonable time after?
Rule 53 of the Rules empowers me to issue a final judgment even at a preliminary hearing if the issue I decide is determinative of the whole case.

7. The Law

7.1. The law of unfair dismissal is in Part 10 of the Employment Rights Act 1996 (the Act). Section 97 defines the effective date of termination("EDT") which is, in lay terms, **the date of dismissal NOT the date of the conclusion of any internal appeal.** Section 111(2) provides a complaint of unfair dismissal **shall not be considered** unless presented to the tribunal –
a) *before the end of 3 months beginning with the effective date of termination, or*

b) *within such other period as the tribunal considers reasonable 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.*

7.2. Section 207B: "*Extension of time limits to facilitate conciliation before institution of proceedings*" extends time limits to enable EC. On a best case scenario from the claimant's point of view the last day on which he could have issued in time was 20 August 2020. The answer to issue (a) is it was not presented in time.

7.3. The burden of proving it was not reasonably "practicable" (which means feasible or "do-able") to do so rests on the claimant, see Porter-v-Bandridge 1978 ICR 943. In Palmer-v-Southend on Sea Borough Council 1984 IRLR 119 the Court of Appeal held the Tribunal must decide as a question of fact taking all the circumstances into account (i) **the substantial cause** of the failure to comply with the time limit (ii) whether and when, the claimant knew he had the right to complain (iii) whether he was being advised at any material time and, if so, by whom, and (iv) whether there was any substantial fault on the part of the claimant or advisor which led to failure to comply with the time limit. Time **limits** are just that, limits not targets, and I have no general discretion to waive them under the Act. Even cases which are presented only a few minutes after the deadline have to be dismissed unless it was not reasonably practicable to issue in time.

7.4. Dedman-v-British Building 1973 IRLR 379 held where **either the claimant or his advisers** were at fault in allowing the time limit to pass, it is reasonably practicable to present in time. As with other mistaken beliefs of law they will only render it not so if the mistaken belief is in itself reasonable, Wall's Meat-v-Khan 1978 IRLR 499. If the mistaken belief results from the fault of his advisers in not giving him all the information, the claimant will not be able to rely upon his mistaken belief. Similar points were made in Riley -v-Tesco Stores1980 IRLR 103

7.5. Porter-v-Bandridge Ltd held the correct test is not whether the claimant knew of his rights, but whether he ought to have. This extends to knowledge of time-limits too. Trevelyans (Birmingham)Ltd-v-Norton 1991 ICR 488 held when a claimant knows of his right to claim unfair dismissal, he must **seek** information and advice about how **and when** to enforce that right. In Sodexo Health Care Services Ltd-v-Harmer EATS 0079/08 the claimant submitted 23 days late because she wrongly assumed the time limit would not start running until the end of the appeal process. The Employment Appeal Tribunal (EAT) said the crucial question was whether, in the circumstances, she was reasonably ignorant of the time limit. Given she knew of a time limit but had failed to make proper inquiries, the only answer to the question whether she was reasonably ignorant of the start date of the time limit was "no".

7.6. In John Lewis Partnership-v-Charman EAT 0079/11, a young inexperienced claimant knew nothing about the right to claim unfair dismissal prior to his termination. The EAT upheld the decision to permit the claim saying the relevant question was whether that ignorance was reasonable. He had no union or legal advice. He relied heavily on his father who had been given inaccurate advice by ACAS. The case is one of the rare examples of a reasonable ignorance of the law. Generally a claimant who knows of the right to claim is expected to make enquiries as to how, and within what period, to exercise the right. In Marks and Spencer plc-v-Williams-Ryan 2005 ICR 1293 the claimant believed she had to exhaust the internal appeal procedure before she could bring a claim and had this confirmed by the Citizens Advice Bureau. The tribunal allowed her claim to proceed out of time. Lord Phillips said: '*Were these conclusions on the part of the tribunal **perverse**? I have concluded that they were not. I think*

*the findings were **generous** .., but not outside the ambit of conclusions a tribunal could properly reach on all the facts before them.*' "Perverse" means no reasonable Tribunal could have reached the conclusion. In that case misleading advice, from a voluntary organisation to which many people turn and rely upon was what saved the claimant. In other cases where the employer itself has mislead the employee it has been found not reasonable practicable.

8. Findings of Fact

8.1. I heard no evidence but took careful note what the claimant says in his email quoted at paragraph 3 above. The documents showed at the dismissal hearing on 22 April a Mr Derek Muse of Unison was present to represent the claimant. The charge was serious and the outcome of dismissal with immediate effect announced that day. It was confirmed in writing on 23 April. He appealed on 27 April

8.2. The appeal was heard on 28 May, again with Mr Muse there. At this point, the union certainly should have known the "clock was running down". The appeal outcome came by letter on 2 June. Delay in arranging the appeal does not excuse late presentation, see Community Integrated Care-v-Peacock 2010 UKEATS/0015/10. The claimant contacted ACAS on 26 June. He said in his email, he thought he had three months **after** the appeal result but that is wrong. I have no evidence Mr Muse failed to give the claimant correct advice. I cannot find anyone caused the claimant to hold his mistaken belief In fact, after he was given the appeal outcome, he acted promptly to start EC, but then took longer than reasonable between getting his EC Certificate on 20 July and issuing on 26 August. The problem he could not have overcome today , even had he connected today was there is no reasonable explanation for him thinking time started from the appeal outcome.

9. Conclusions

9.1. I have cited the cases above to show the claimant there are exceptional cases where ignorance of the correct time limit has been held to be reasonable. However, this case does not approach that level. He was aware of the right to claim and should have been aware of the time-limits. If he was unaware, the union certainly should have been. The claim form gave no start date or EDT. The error which explained late presentation was not other factors such as his grandparent's health, rather it was thinking the time limit started at the end of the appeal. Many cases have held that is wrong. It is not one of the more esoteric points about time limits, it is long established, well publicised and easily accessible.

9.2. Unlike time limits under the Equality Act 2010, I cannot decide what is just and equitable. Unless the claimant can satisfy the " not reasonably practicable test", my hands are tied. I find it was reasonable practicable to present in time and I have no further discretion to exercise. The Tribunal cannot consider his claim which is hereby dismissed

Employment Judge T.M.Garnon.
Judgment authorised by the Employment Judge on 16 November 2020