



# EMPLOYMENT TRIBUNALS

**Claimant:** Abdul Aziz Yakub

**Respondent:** City and Essex Ltd

**Heard at:** East London Hearing Centre (by Cloud Video Platform)

**On:** 17 December 2020

**Before:** Employment Judge Housego

## Representation

**Claimant:** Wayne Lewis

**Respondent:** Ms Fiona Haworth, Senior HR Consultant

# JUDGMENT

**The Claim was filed out of time and is struck out.**

# REASONS

## Law

1. A claim for unfair dismissal must be presented within 3 months of the effective date of termination<sup>1</sup>, extended in a variety of ways by the requirement to obtain an Early Conciliation Certificate from ACAS before filing a claim. What the extension is depends on when the notification is given by the Claimant and when the certificate is issued<sup>2</sup>. If not so filed, time may be extended for such further time as is reasonable, but only if it was not reasonably practicable for the claim to have been filed in time.

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<sup>1</sup> Employment Rights Act 1996 S 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.

<sup>2</sup> S207B of the Employment Rights Act 1996.

2. General guidance for the parties about the approach of the Tribunal in such cases (not all will be applicable) is:

The test for extending time has two limbs to it, both of which must be satisfied before the Tribunal will extend time:

- first the Claimant must satisfy the Tribunal that it was not reasonably practicable for the complaint to be presented before the end of the 3 month primary time limit
- if the Claimant clears that first hurdle, he must also show that the time which elapsed after the expiry of the 3 month time limit before the claim was in fact presented was itself a 'reasonable' period.

3. Hence, even if the Tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the 3 month time limit, if the period of time which elapsed after the expiry of the time limit was longer than was 'reasonable' in the circumstances of the case, no extension of time will be granted.

4. As regards the first limb of the test, it is quite difficult to persuade a Tribunal that it was 'not reasonably practicable' to bring a claim in time. A Tribunal will tend to focus on the 'practical' hurdles faced by the Claimant, rather than any subjective difficulties such as a lack of knowledge of the law, an ongoing relationship with the employer or the fact that criminal proceedings are still pending. The principles which tend to apply are:

- section 111(2)(b) ERA should be given a liberal construction in favour of the employee
- it is not reasonably practicable for an employee to present a claim within the primary time limit if he was, reasonably, in ignorance of that time limit
- however, a Claimant will not be able to successfully argue that it was not reasonably practicable to make a timely complaint to an Employment Tribunal, if she has consulted a skilled adviser, even if that adviser was negligent and failed to advise him correctly
- there may be exceptional circumstances where that principle may not apply, namely where the adviser's failure to give the correct advice about time limits is itself reasonable, for example, where both the Claimant and the adviser have been misled by the employer as to some material factual matter such as the date of dismissal
- where a claimant has consulted skilled advisers, such as solicitors, the question of reasonable practicability is to be judged by what she could have done if he had been given such advice as they should reasonably in all the circumstances have given him
- the question of reasonable practicability is one of fact for the Tribunal, and should be decided by close attention to the particular circumstances of the particular case
- a Claimant can rely on failure to act in reliance on advice from, for example, Tribunal employees or government officials. In *Fazackerley* the EAT held that the Employment Tribunal did not err in finding that it was not

reasonably practicable for the claimant to have brought proceedings in time when he relied on incomplete advice from Acas that he should exhaust an internal appeal process first before considering starting a Tribunal claim

- it is not reasonably practicable to bring a claim if a Claimant is unaware of the facts giving rise to the claim. However, once they have discovered them, a Tribunal will expect them to present the claim as soon as reasonably practicable, rather than allowing 3 months to run from the date of discovery
- if a Claimant knows of the facts giving rise to the claim and ought reasonably to know that they had the right to bring a claim, a Tribunal is likely not to extend time. If the Claimant has some idea that they could bring a claim but does not take legal advice, a Tribunal is even less likely to extend time
- if a letter is posted by first class post, it is reasonable to assume that it will be delivered two days later (excluding Sundays and Bank Holidays). If it is not, a Tribunal is likely to extend time. However, the onus is on the Claimant to ensure that it does arrive in time: he must take all reasonable steps to check. Claimants' representatives should therefore always make a note of when they would expect to receive a response from the Tribunal (or Acas) and to chase if it has not been received
- if an employee makes a mistake on a claim form which means that it is rejected by an Employment Tribunal (such as incorrectly stating the early conciliation certificate number) and thereafter the time limit for the claim expires while she is labouring under the misunderstanding that she has not made a mistake, that misunderstanding—provided it is reasonable in the circumstances—may justify an extension to the time limit on the basis that it was not reasonably practicable for her to have brought the claim in time
- where an error on the part of solicitors leads to an initial employment tribunal claim being rejected and a corrected resubmitted second claim being presented out of time, in deciding whether it was 'not reasonably practical' for the resubmitted claim to be presented in time, the employment tribunal must assess the reasonableness of the solicitors' original error. This involves taking into account all the circumstances (eg in *Zhou* the claimant had completed her own ET1 form to save costs and her solicitors did not spot her error in respect of the early conciliation certificate number) and a recognition that not every omission, however technical, is unreasonable. In accordance with the *Dedman* principle:
  - if the error which led to the first claim being rejected was reasonable, and the claimant and her solicitors thereby believed a valid claim had been presented in time, the tribunal may find that it was not reasonably practicable to present the second claim in time, however
  - if the error on the part of the solicitors was not reasonable, then the claimant is bound by their error, and it would have been reasonably practicable for the claim to have been presented in time

5. If the first limb of the test is satisfied, the Claimant must then satisfy the second as well: even if a Tribunal concludes that it was not reasonably practicable for a Claimant to present the claim within the 3 month time limit (or extended period where the requirement for early conciliation applies) no extension of time will be granted unless the claim was presented within a 'reasonable' time (judged according to the circumstances of the case) thereafter.

6. If a Tribunal concludes that the extent of the delay between expiry of the primary 3 month limitation period (or extended period where the requirement for early conciliation applies) and the date the claim was presented was objectively unreasonable, the fact that the delay was caused by the Claimant's advisers rather than by the Claimant makes no difference, and hence a time extension will be refused.

### **Chronology and facts**

7. In this case:

7.1 On 10 October 2019 the Claimant's employment ended, with his resignation.

7.2 On 06 January 2020 the Claimant's representatives commenced the early conciliation process. This was 3 days inside the time limit of 3 months.

7.3 On 21 January 2020 Acas issued the early conciliation certificate. In reply to enquiry from the Tribunal Acas said that they did so having tried but failed to contact the Claimant's representative. Acas did not say in what way they tried to contact the Claimant's representative, but it is likely to have been by email, or perhaps by phone. They gave no detail of what those attempts were. I will work on the basis that it was email. The Claimant did have some email issues at about this time, as its outsourced IT provider confirmed in a letter provided for the purpose of this hearing. I accept that the Claimant's representative was unaware of the attempts by Acas to contact them.

7.4 On 21 January 2020 the early conciliation certificate was issued. These are sent by email. I accept that the Claimant's representative did not receive it, for the same reason.

7.5 On 21 February 2020 the time limit expired, 1 month after the issue of the early conciliation certificate.

7.6 On 25 February 2020 (a Tuesday) the Claimant's representative reviewed the file and rang Acas to ask the position, and so learned that the certificate was issued on 21 January 2020.

7.7 On 28 February 2020 at 14:12 the claim was filed.

### **Submissions**

8. Mr Lewis ably submitted that:

8.1 The email issues were an entirely credible reason why the attempts by Acas to contact the Claimant's representative had been unsuccessful, and why the existence of the early conciliation

certificate was not known to the Claimant's representative. There was sparse detail from Acas, and they ought to have made more effort – if email was unanswered they could have called, but they did not say that they had.

8.2 There was no reason for the Claimant's representative to have thought that the early conciliation certificate would be issued other than at the end of the default period of 1 month – and as that would have been 06 February 2020 the claim, issued on 28 February 2020, would have been in time.

8.3 The guidance for S111(2) was that “reasonably practicable” should be interpreted liberally, and Palmer & An'or v Southend-on-Sea BC [1984] EWCA Civ 372 set out that

*“Reasonably practicable” in section 67(2) of the Act [as it then was] should be construed neither so widely as to mean simply “reasonable” nor so narrowly as to mean “reasonably capable physically of being done”; that, however, the meaning of “reasonably practicable” was expressed between those two limits, the answer to whether it was reasonably practicable to present the complaint within the time limit was an issue of fact for the industrial tribunal to determine in the circumstances of the case...”*

8.4 In all the circumstances of the case discretion should be exercised to permit the claim to proceed, for otherwise through no fault of his own the Claimant would not have access to justice.

9. Ms Haworth was brief in her response. Mr Walker said that he reviewed his files at 2 weekly intervals, and as he did so on 25 February 2020 he ought to have done so on 11 February 2020, and as that was over a month from the start of the early conciliation period that was the time the issue of the certificate should have been discovered, and then the claim would have been in time. Mr Walker was able to find out from Acas on 25 February 2020 that the certificate had been issued: it followed that he could have done so on 11 February 2020. On 28 February 2020 no mention was made of the claim being out of time, and application should have been made at the time the claim was filed, not wait until it was raised at a case management hearing.

## Conclusions

10. The test of “*reasonably practicable*” is much stricter than the “*just and equitable*” test in discrimination cases. If this were a discrimination case I would extend time: the extent by which it is out of time is small (so there is little prejudice to the Respondent, striking out is draconian, there were difficulties with emails not being received, and mistakes happen).

11. However “*reasonably practicable*” focusses on the Claimant. While, had the early conciliation certificate been issued after a month, the claim would have been in time that is not a relevant consideration.

12. While having sympathy with the Claimant, and with Mr Walker, it is without doubt that:

- 12.1 The file should have been diarised for 06 February 2020 to see whether the early conciliation certificate had been issued, and chased up if no communication had been received from Acas.
- 12.2 Either the file review for 11 February 2020 did not take place, or it failed to notice that the early conciliation certificate should by then have been issued.
- 12.3 The Claimant's employment having ended on 10 October 2019, and early conciliation not starting until 3 days before the end of the primary limitation period, the time limit would run out 1 month after the date of the early conciliation certificate.

13. This was, unfortunately, simply a failure to diarise and follow up, and so the limitation date was missed. While it is unfortunate that the time limit was not later (as it would have been had the certificate been issued after a month) that would have been a matter of luck. It was reasonably practicable for the Claimant's representative to have checked the position about the early conciliation certificate on 06 or 11 February 2020, and representatives are expected to do so. No one misled the Claimant or his representative. Had that check been undertaken, the claim could have been lodged within 3 days, as occurred between 25 and 28 February 2020. Claimants' representatives' errors are not reason to allow claims for unfair dismissal to proceed when presented out of time.

14. It follows that the Claimant has not been able to show that it was not reasonably practicable to file the claim within the time limit and so I must strike out the claim.

15. For the sake of completeness, while the claim form should have been good to go immediately the early conciliation certificate was received, I would have found the further period of (less than) 3 days to submit it a further period which I consider reasonable.

**Employment Judge Housego**  
**Date: 17 December 2020**