EMPLOYMENT TRIBUNALS

Claimant: **Dawn Butler**

Respondents: **(1) Friends and Places Together**
(2) Denise Nygate

Heard at: **East London Hearing Centre (by telephone)**

On: **14 December 2020**

Before: **Employment Judge Housego**

Representation

Claimant: Did not appear, was not represented and sent no representations.

Respondents: Peter Collyer, of Citation Ltd

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[1], 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[2]. 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.

[1] 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.

[2] 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, she 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 she 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 her 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 19 March 2019 the 1st Respondent sent an email to the Claimant summarily dismissing her. It says this was the date of dismissal.

   7.2 In her claim form the Claimant states the date of dismissal was 21 March 2020, but did not give a reason why it was other than the date of the email. It may be that she says 21 March 2020 was the date she read it. This is not known by the Respondent, as although they requested a read receipt they did not get one.

   7.3 On 19 June 2020 the Claimant approached Acas to start the Early Conciliation ("EC") period, in respect of Denise Nygate. This was in time if the date of dismissal was, as the Claimant says, 21 March 2020, but 1 day out of time if it was 19 March 2020.

   7.4 As Denise Nygate was never the employer of the Claimant the claim for unfair dismissal against her would inevitably be struck out in any event.

   7.5 On 25 June 2020 the Claimant started the EC procedure with Acas in respect of the 1st Respondent. Whether the date of dismissal was 19 or 21 March 2020 this was out of time.

   7.6 The Acas EC period ended on 21 July 2020.

   7.7 The claim was filed on 14 August 2020.

   7.8 The Respondent emailed the Claimant about this hearing, on 08 December 2020, and on 09 December 2020 the Claimant replied stating that she had sought advice from Acas and had followed it, and was within the time limits she was given.

8. The Claimant plainly knew about the hearing. She was sent the same notice as the Respondent, and their representative had no difficulty in calling in. The Respondent reminded her by email about the hearing, and she responded. It is apparent that she knew of the hearing, and that it was about time limits being exceeded. I checked the claim form for a telephone number for the Claimant, but there was none.

9. Accordingly the claim against the 1st Respondent was filed out of time, and no reason is given as to why it was not reasonably practicable to file it in time. The Claimant referred, in her email of 09 December 2020 to the Respondent, to advice from Acas, but has not given any indication of what that advice was, and has not sent any submissions to the Tribunal.

10. Therefore I must strike out the claim.

11. Even it was not reasonably practicable to file the claim in time, the Claimant did not file it for 26 days after the EC certificate was obtained, and that is a further period of unreasonable length, so that even if I had been satisfied that the Claimant had been misled by advice from Acas the claim would still have to be struck out.

12. The claim against the 2nd Respondent is, on the balance of probabilities, also out of time, as the email was more likely than not read on the day it was sent. Even if it was in time (as it would be if the date of dismissal was 21 March 2020) it must still be struck out, as Denise Nygate was the CEO of the 1st Respondent and was never the employer of the Claimant.

Employment Judge Housego
Date 14 December 2020