



EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr S Atkinson **v** **Booker Limited**

Heard at: London Central (by video) **On:** 14 July 2020

Before: Employment Judge E Burns

Representation

For the Claimant: Mr Makh (trade union representative)

For the Respondent: Ms Urmston (solicitor)

JUDGMENT

The judgment of the employment tribunal is that the tribunal has jurisdiction to consider the claim. The tribunal is satisfied that it was not reasonably practicable for the claim to be presented within the normal time limit, but the claimant has presented it within such further period as the tribunal considers reasonable.

REASONS

Hearing

1. The purpose of the preliminary hearing was to consider whether the claimant's claim for unfair dismissal had been brought in time having regard to section 111 of the Employment Rights Act 1996.
2. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under rule 46. The parties agreed to the hearing being conducted in this way.
3. In accordance with Rule 46, the tribunal ensured that members of the public could attend and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public attended the hearing accordingly.

4. The participants were warned in advance that it was an offence to record the proceedings.
5. Unfortunately, the claimant, who was giving evidence, had significant difficulties joining the hearing with video. After discussion, the parties and I agreed that he should join by telephone and give his evidence orally. He had submitted a written statement and his evidence was very short. I am satisfied that he was not being assisted by any unseen third party while giving his evidence.
6. There was a hearing bundle of documents of 393 pages, I read the entire bundle and refer below to the page numbers of key documents that I relied upon when reaching my decision.
7. Both of the representatives provided very helpful written submissions and case law authorities.

Findings of Fact

8. The claimant was employed by the respondent initially as a driver and later as a butchery apprentice.
9. There is no dispute between the parties as to the effective date of termination. The claimant was verbally told that he was being dismissed on 15 August 2019 and accepts this is the date on which the termination of his employment took effect. He was paid in lieu of his entitlement to 2 weeks' notice.
10. The claimant commenced the early conciliation through ACAS. He was given an ACAS certificate (number R574694/19/856) which confirms that the early conciliation process was initiated on 21 September 2019 and the certificate was issued on 6 October 2019. The certificate gives the name of the prospective respondent as "Booker"(1).
11. The parties do not dispute that the modified time limit (taking into account the ACAS early conciliation process) ended on 29 November 2019.
12. Following the end of the early conciliation process, but before presenting a claim form, the claimant received confirmation that he would receive union support to pursue a claim. This was in October 2019.
13. Notwithstanding that he had union support, the claimant was responsible for presenting his own claim form to the tribunal, which he did using the on-line mechanism on 15 November 2019. He said in his evidence, which I accept, that the union told him that he had to take care of the claim form himself first. I took this to mean that the arrangement was that the union would deal with the tribunal proceedings after the claim form had been submitted.
14. The name of the claimant's employer is said to be "Booker Wholesale" in box 2.1 of the claim form (2). The form names a union representative in the representative section (10).

15. I find the claimant was genuinely confused about the name of his employer and likely did that “Booker Wholesale” was the correct name for his employer, notwithstanding that his payslips and P45 gave the name “Booker Limited” as his employer. The claimant appended to his witness statement evidence of the widescale use of the name “Booker Wholesale” across various materials used by the respondent. This included his apprenticeship folder.
16. My finding is therefore that the claimant genuinely believed that he had submitted his claim form correctly.
17. The employment tribunal wrote to the claimant’s representative rejecting the claim form on 28 November 2019, the day before the modified time limit (14). The claim form had been referred to Employment Judge Hodgson who rejected it because the name of the prospective respondent on the early conciliation certificate was not the same as the name of the claim form.
18. I am told the letter was sent by post, but not whether this was by first or second class post. It is more likely that not that the letter, having been posted on Thursday 28 November 2019, arrived on Saturday 30 November 2019. The first working day after this was Monday 2 December 2019.
19. Mr Makh said in submissions, rather than in evidence, that he thought the letter most probably arrived on Monday 2 December 2020. He also said that as soon as he became aware of the letter, he informed the claimant and worked on an application for a reconsideration. He said he had not dealt with this type of rejection previously and did his best in a short space of time to send an informed response to the tribunal.
20. The written application was dated 5 December 2019. The letter confirmed that the correct name of the claimant’s employer was “Booker Limited” based on a review of the claimant’s P45 (15 - 16).
21. The tribunal responded on 17 January 2020 confirming Employment Judge Hodgson had reconsidered his decision and the claim had now been accepted. The letter said:

“Because the original decision to reject the claim was correct but the defect which led to the rejection has since been rectified, the claim form is to be treated as having been received on 5 December 2019.

On the 5 December 2019 the claimant rectified the defect that caused the rejection of his claim by naming "Booker" as the respondent. His claim against "Booker" will be accepted at that date. Further, his request of 5 December 2019 to substitute Booker Limited for Booker is granted.” (17)
22. The claimant did not appeal against the decision of Employment Judge Hodgson.

23. As the claim was not accepted until 5 December 2020, it is understood by all to have been presented 6 day's late.

The Law

24. The normal time limit for presenting a claim for unfair dismissal to a tribunal is set out in 111(2)(a) & (b) of the Employment Rights Act 1996.
25. Section 111(2)(a) provides that a tribunal shall not consider a claim of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination.
26. In a case where an employee is dismissed without notice or with a payment in lieu of notice, the effective date of termination is the date on which that termination takes effect (section 97(1)(b), ERA 1996).
27. Section 111(2)(b) provides an exception. There are two limbs to this test. Accordingly, a tribunal may consider a claim presented outside the normal time limit, if it is satisfied that:
- it was not reasonably practicable for the claim to be presented within the normal time limited; and
 - the claimant has presented it within such further period as the tribunal considers reasonable.
28. The normal time limit is extended by section 270B of the Employment Rights Act 1996 to take account of the obligation to enter into early conciliation facilitated by ACAS.
29. In order to determine how the normal time limit will be extended by early conciliation, it is first necessary to identify Day A and Day B and then apply the extensions in section 207B(3) and 207B(4) accordingly. They are defined in section 270B(2). Day A is the day on which the prospective claimant initiates the early conciliation process and Day B is the date of the EC certificate issued when the process is concluded.
30. The extension under section 207B(3) applies in every case. It operates to "stop the clock" during the period in which the parties participate in EC as it provides that in working out when a time limit expires, the period beginning with the day after Day A and ending with Day B is not to be counted.
31. The additional extension under section 207B(4) only applies in certain circumstances, where the limitation date, as calculated by subsection 207B(3) falls in the period between Day A and one month after Day B. it did not therefore apply here.
32. The burden of proof for establishing that it was not reasonably practicable to present the claim in time is on the claimant. Case law (*Marks & Spencer*

plc v Williams-Ryan [2005] EWCA Civ 470) confirms that the tribunal can take into account various factors such as:

- the substantial cause of the claimant's failure to comply with the time limit;
 - whether and when the claimant knew of their rights, including whether the claimant was ignorant of any key information;
 - whether the claimant had been advised by anyone and the nature of the advice given;
 - whether there was any substantial fault on the part of the claimant or their adviser which led to the failure to present the complaint in time.
33. As confirmed in *Marks & Spencer plc v Williams-Ryan* a claimant's ignorance of the right to bring a claim or of the time limit or procedure for making a claim, will not automatically lead to a finding that it was not reasonably practicable for the claimant to present the claim in time. Where ignorance is a factor, the tribunal needs to be satisfied that the claimant's ignorance was reasonable in all the circumstances.
34. I was helpfully reminded that, as per the case of *Dedman v British Building and Engineering Appliances Ltd* [1974] 1 WLR 171, if a claimant goes to a skilled adviser and the skilled adviser makes a mistake, in that case failing to advise a claimant of the time limit, the claimant will be caught by that mistake. Any remedy would lie against the claimant's advisers. The definition of "skilled adviser" includes a trade union representative (*London Borough of Islington v Brown* EAT 0078/07).
35. I also had regard to the EAT decision in the case of *Adams v British Telecom PLC* UKEAT/0342/15/LA. That case sets out the test to be applied where a claimant presents a defective claim in time which is rejected and then presented a remedied claim after the normal time limit. The case makes it clear that I have to consider whether it was reasonably practicable for the second claim (and not the first) to be presented within the normal time limit.
36. As confirmed in paragraph 19 of the judgment: "The question for the Tribunal, in those circumstances, was not whether the mistake originally made was a reasonable one but **whether [the claimant's] mistaken belief that [he] 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.**" (emphasis added)
37. If the first limb of the test under section 111(2)(b) is satisfied, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. This is a matter for the tribunal (*Wall's Meat Co Ltd v Khan* [1978] IRLR 499, [1979] ICR 52, CA) bearing in mind the length of and circumstances of the delay.

38. Finally, under rule 90 of the Tribunal Rules, any document sent by post is deemed to be served on the day on which it would be delivered in the ordinary course of post. This is normally taken to be two days after posting.

Analysis and Conclusion

39. As noted above, I have found, as a matter of fact, that the claimant genuinely believed that he had submitted his claim form correctly. The original claim form was presented well before the time limit and so his ignorance was not concerned with the time limit itself, but with the correct name of his employer.
40. Applying the test in *Adams* to this case, in my judgment, the claimant's genuine, but mistakenly held belief that he had correctly presented his first claim on time and did not therefore need to put in a second claim, was reasonable in the circumstances.
41. It is surprisingly common that employees are unaware of the correct name of their employers, especially in circumstances where the employer uses a variety of brand names for marketing purposes and/or is part of a group structure. The difference between trading names and different legal entities is complex and it is understandable that a lay person in the claimant's position would not understand it, even though he had payslips and a P45 showing the correct name.
42. The union was not advising the claimant during the period the early conciliation process was taking place and had told him that it was his responsibility to submit the claim. For this reason, I am satisfied the claimant's mistake does not fall into the *Deadman* category where the claimant's skilled adviser, having assumed a duty of care, failed to advise him properly.
43. The claimant only learned that there was a problem with the claim form after the tribunal wrote to the claimant's representative. This was after the normal time limit had expired. As the claimant could not have realised he had to submit a second claim until after the expiry of the normal time, it cannot have been reasonably practicable for the second claim to be submitted within the normal time limit. The first limb of the test under section 111(2) is therefore met.
44. So far as the second limb of the test under section 111(2) is concerned, to allow the claim to proceed I need to be satisfied that the application for reconsideration was presented in such further period as the tribunal considers reasonable.
45. My judgment is that it was. Having received a letter from the tribunal rejecting the claim on Monday 2 December 2019, the claimant's representative had submitted an application for reconsideration by 5 December 2019. This was within 3 days. In my view, the matter was dealt with sufficiently promptly at this point.

46. My decision is therefore that the tribunal has jurisdiction to consider the claimant's claim.

Employment Judge E Burns
14 July 2020

Sent to the parties on:

11/11/2020

For the Tribunals Office