EMPLOYMENT TRIBUNALS

Claimant: Miss S Carter

Respondent: MAC Cosmetics

Heard at: London South Croydon

On: 26 July 2021

Before: Employment Judge Tsamados (sitting alone)

Representation

Claimant: Did not attend and was not represented
Respondent: Ms K Balmer, Counsel

This has been a remote hearing which was not objected to by the parties. The form of remote hearing was video by Cloud Video Platform (CVP). A face to face hearing was not held because it was not practical because of the Covid-19 virus.

JUDGMENT AT PRELIMINARY HEARING

The Judgment of the Employment Tribunal is as follows:

The claim was presented outside the time limits contained within section 111 of the Employment Rights Act 1996. The claim is dismissed because the Tribunal has no jurisdiction to hear it.

REASONS

Background

1. On 22 October 2020 following a period of early conciliation between 25 July and 25 August 2020, the claimant presented a claim to the Employment

Tribunal in which she complained that she had been unfairly dismissed by the respondent. Her employment came to an end either on 31 May 2020, as she alleges, or on 29 August 2020, as the respondent alleges. On either date her claim was presented to the Tribunal out of time.

2. On 2 December 2020, the respondent presented its response to the claim, in which it denied unfairly dismissing the claimant. At the same time the respondent requested that an open preliminary hearing be convened to consider striking out the claimant's claim under rule 37(1) of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Regulations"), her claim having been presented out of time and the Tribunal having no jurisdiction to hear it.

3. I would note that in its response, the respondent states that the correct name of the respondent is Estee Lauder Cosmetics Ltd and not MAC Cosmetics as stated by the claimant in her claim form. The respondent further states that MAC Cosmetics is a trading brand operated by Estee Lauder Cosmetics Ltd. However, I saw no need to change the name of the respondent in the circumstances.

Today's hearing

4. On 2 March 2021, the Tribunal wrote to the parties informing them that the case would be listed for two hours and would deal with the respondent's strike out application. On 16 March 2021, the Tribunal wrote again to the parties, notifying them that the preliminary hearing would take place on 24 June 2021. The Tribunal then wrote to the parties on 7 June 2021 advising them that the hearing would take place by video using the HMCTS secure Cloud Video Platform ("CVP"). On 18 June 2021, the claimant requested a postponement of the hearing on health grounds and due to her pregnancy. On 23 June 2021, the Tribunal wrote to the parties granting the postponement. The hearing was relisted for today starting at 10 am and this was confirmed to the parties, with the CVP joining details, on 23 July 2021.

5. By 10.00 am the claimant was not present in the CVP room and there had been no prior contact from her explaining her absence or requesting a postponement. I directed my clerk to telephone the claimant on the number provided in her claim form. My clerk subsequently advised me that the claimant's telephone had gone straight to voicemail. I directed my clerk to email the claimant on the email address provided in her claim form, advising her that the hearing will commence at 10:45 am and that she either needed to attend by that time or contact the Tribunal with an explanation for her non-attendance. I further asked my clerk to advise the claimant that if she was not present in the hearing room and had not contacted the Tribunal with an explanation by 10.45 am, then the hearing would proceed in her absence and her claim could be dismissed. My clerk emailed the claimant. There was no response from her by 10.45 am or indeed by 11 am when the hearing commenced.

6. In told Ms Balmer that I was considering whether to continue with the hearing in the Claimant's absence or to dismiss her claim under rule 47 of

the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 ("the 2013 Regulations"). Rule 47 states:

> *"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 the party's absence."*

7. Indeed, I had made enquiries of the claimant by telephone and email, being alert to her earlier request for a postponement because of her pregnancy and health conditions.

8. Ms Balmer submitted that I should proceed on the following grounds: 1) there was no good reason for the claimant's non-attendance; 2) she had made no application to postpone and there was no good reason for her not to; and 3) it would be in accordance with the overriding objective and the matter could be dealt with fairly today. Ms Balmer then set out in more detail the substance of these grounds.

9. I looked at the chronology of events on file as to notification of the hearing. The claimant has been aware that there would be a preliminary hearing as far back as 16 March 2021. It was originally scheduled for 24 June 2021. Notification that the matter would proceed by way of CVP was sent out on 7 June 2021. The claimant emailed the respondent and the Tribunal on 18 June 2021 requesting a postponement because of her pregnancy and health issues. The hearing was postponed in an email sent to the parties dated 23 June 2021. A further email sent to the parties on 8 July 2021 relisting the preliminary hearing for 26 July 2021 by CVP and by a further email dated 23 July 2021 the time estimate was changed to 2 hours.

10. All of these emails were sent to the email address provided by the claimant on her claim form and from which she has corresponded with the respondent and the Tribunal. Moreover, the respondent's solicitors have sent several emails to the claimant regarding the hearing and Ms Balmer sent her skeleton argument to the claimant by email last Friday.

11. Ms Balmer submitted that on this basis the claimant has had ample notice of the hearing, she has made no application to postpone, and she has the ability and is aware of the need to do so having done it before.

12. Ms Balmer also submitted that it would be in accordance with the Tribunal's overriding objective (within the 2013 Regulations) to proceed, the hearing having been postponed once already and costs incurred by the respondent. Further, she submitted that the matter can be dealt with fairly today, the claimant having provided a witness statement and an email setting out her explanation as to why the claim was not presented sooner. Ms Balmer said taking her evidence at its highest the application is out of time.

13. Having heard Ms Balmer's submissions and having considered the chronology that set out above, I decided to proceed on hear the application.

14. The respondent had provided the Tribunal and the claimant with an electronic bundle of documents comprising of 75 pages and also a written

skeleton argument. The claimant had responded to the strike out application in her email dated 7 December 2020 and she also provided a witness statement consisting of 14 paragraphs on 30 December 2020.

The respondent's application

15. Today's hearing was convened to determine whether the claimant's claim was presented within the time limit contained within section 111 of the Employment Rights Act 1996 ("ERA 1996"). The application was made under rule 37(1) of the 2013 Regulations which states that a Tribunal may strike out all or part of a claim on a number of grounds, in this case, that the claim has no reasonable prospects of success. However, it is also a freestanding jurisdictional issue and that was how it was presented today and how I approached the matter. In any event the issue is the same: was the claim presented within the time limit in section 111 ERA 1996 and if not does the claimant avail herself of the discretion within that section?

16. Ms Balmer spoke to her written skeleton. II do not propose to set her submissions out in this judgment but I have taken them into account and will refer to where appropriate.

Relevant law

17. Section 111(2) ERA 1996 states that:

> *"… [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.*
> *[(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) [and section 207B (extension of time-limits to facilitate conciliation before institution of proceedings) apply] for the purposes of subsection (2)(a).]"*

18. There are two limbs to this formula. First, the claimant must show that it was not reasonably practicable to present her claim in time. The burden of proving this rests firmly on the claimant (Porter v Bandridge Ltd [1978] IRLR 271, CA). Second, if she succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

19. Whether it was reasonably practicable for the claimant to submit her claim in time is a question of fact for the Tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the claimant's reasons.

20. The Court of Appeal in Palmer & Anor v Southend on Sea Council [1984] IRLR 119 considered the meaning of the words "reasonably practicable2 and concluded that this does not mean "reasonable", which would be too favourable to employers and does not mean "physically possible", which would be too favourable to employees, but means something like "reasonably feasible", ie was it reasonably feasible to present the claim to the Tribunal within the time limit.

21. May LJ in Palmer stated that the factors affecting a claimant's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the claimant's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the claimant knew of his rights; whether the employer had misrepresented any relevant matter to the claimant; whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the claim in time.

22. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the Tribunal to answer this question "against the background of the surrounding circumstances and the aim to be achieved". This is what the "injection of the qualification of reasonableness requires" (Schultz v Esso Petroleum Ltd [1999] IRLR 488, CA)

23. In the context of knowledge of the right to claim unfair dismissal and/or the time limits to bring claims, I was grateful to Ms Balmer for directing me to Wall's Meat Co Ltd v Khan [1979] ICR 52 and Marks & Spencer plc v Williams-Ryan [2005] IRLR 562, CA. In particular the passage from Brandon LJ in the Wall's Meat case at page 60F:

> *"… The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of her solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."*

24. Ms Balmer also referred me to a specific finding in Palmer that the mere fact that any internal appeal was pending was not sufficient to render it not reasonably practicable to present a claim in time. She further referred me to Inchcape Retail Ltd v Shelton UKEAT/0142/19/JOJ, at paragraph 30. In that paragraph, the Employment Appeal Tribunal quoted the judgment in Bodha v Hampshire Area Health Authority [1982] ICR 200 (a case expressly approved in Palmer) in which Browne-Wilkinson J said:

> *"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an industrial tribunal, as a question of fact, that it was not reasonably practicable to complain to the industrial tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the industrial tribunal."*

Decision and reasons

25. Having considered the relevant law, the documents before me and the respondent's submissions, I have reached the following decision.

26. The claimant did not submit her claim to the Tribunal within the relevant time-limit, as extended by ACAS early conciliation and she has not put forward circumstances from which I can conclude that it was not reasonably practicable for her to do so. I therefore find that the Employment Tribunal has no jurisdiction to hear her claim and it is dismissed.

27. My reasons for reaching this decision are as follows.

28. The claimant's employment was terminated with effect from either 29 or 31 May 2020. The primary time-limit within which to bring an Employment Tribunal claim expired on either 28 or 30 August 2020. She appealed against her dismissal on 9 June 2020. Whilst the dismissal process was continuing, she commenced ACAS early conciliation on 25 July 2020, and this ended on 25 August 2020. The appeal hearing took place on 5 August 2020. There was some delay in providing her with the outcome of her appeal because of the impact of the COVID-19 pandemic on the respondent's business and related issues as to staff availability and resourcing. The claimant was sent the outcome of her appeal on 16 November 2020. In the meantime she had presented her claim to the Employment Tribunal on 28 October 2020. Allowing for the early conciliation provisions, the limitation period would have expired, on the most generous interpretation, on 25 September 2020.

29. I bear in mind that the Claimant has the burden of proving that it was not reasonably practicable for her claim to have been presented within the relevant time-limit. In her absence, I can only go on what she has said specifically in her email of 7 December 2020 and her witness statement dated 2 December 2020 which give the explanation in identical terms. In short this is that she was unaware an application to the tribunal could be made prior to the internal appeal outcome being presented.

30. From her email dated 7 December 2020, which is at page 68 of the bundle:

> *"With regards to the strike out application, I contest it on the grounds that I was unaware an application to the Tribunal could be made prior to the internal appeal outcome being presented. My liaisons and meetings with the respondent have been timely and it was not by complacency or lack of care that the claim was slightly delayed. It was my belief that it was not reasonably practicable to apply at the time. Further the respondent took four months to present an outcome and communication was fragmented and at times non-reciprocal which caused significant delays."*

31. At paragraph 11 of her witness statement, the claimant repeats the above paragraph in identical terms.

32. I accepted Ms Balmer's submission that the claimant does not assert in either of these documents that she was ignorant of the time-limit within which she could bring a claim in the Tribunal or that any such ignorance led to her failing to present her claim in time. On the contrary, both documents appear to suggest she was aware of the time limits.

33. The claimant contacted ACAS over two months before the expiry of the primary time-limit and it does seem implausible that she would not have been advised about time limits by ACAS during that process.

34. In any event, the claimant referenced having taken legal advice about gross misconduct and dismissal during the appeal hearing which took place on 5 August 2020 (at page 23 of the bundle) and again it does seem implausible that this would not have included discussion about potential claims and time limits.

35. Ignorance of time limits is not in itself grounds on which to successfully avail oneself of the reasonably practicable discretion. The claimant could at any time have enquired into the time limits in which to bringi a Tribunal claim. She could have sought advice from ACAS during the early conciliation process. I am aware that the covering email sent with the early conciliation certificate specifically tells the prospective claimant to seek independent advice as to time limits within which to present Tribunal claims. The claimant could also have sought advice from a professional adviser, including, but not limited to the person from whom she sought the legal advice she referred taking during the appeal hearing. Alternatively the claimant could have found out about time limits herself at any time by doing a simple search online. Merely typing the words "Tribunal time limits" into Google will bring up the relevant information. Moreover, the claimant had obviously found out about the ACAS early conciliation process with no apparent difficulty and so it would have been possible for her to have found out about time limits. I therefore do not accept that any ignorance of the time limits in the circumstances known to me rendered her inability to present her claim in time not reasonably practicable.

36. The sole reason that the claimant has given for presenting her claim late is simply the fact that her internal appeal against dismissal is ongoing and she did not know she could do so until it ended. This in itself does not mean that she is able to avail herself of the reasonably practicable discretion. It is not clear how she arrived at this conclusion. However, in fact the claimant did present her claim to the Employment Tribunal on 22 October 2020 prior to receiving the outcome of appeal on 16 November 2020. As a result, the fact that her appeal against her dismissal was ongoing was clearly not, therefore, a barrier to her presenting her claim. Further, on this basis it could not have rendered it not reasonably practicable for her to do so either within the time limit or sooner.

37. I was also grateful to Ms Balmer for highlighting just how strict the test of reasonable practicability is with the quote from Beasley v National Greed Electricity Transmissions UKEAT/0626/06/DM in which a claim that was presented 88 seconds outside the time limit was refused (at paragraph 31 of the Judgment):

"In conclusion I can well understand why the Claimant is aggrieved by the decision of the Employment Tribunal because he is being deprived of the opportunity to bring his claim even though his claim was just under two minutes late in being presented even though this employers have not been prejudiced in any way whatsoever by this delay. I have every sympathy for the Claimant as the law works first very harshly against those who are a few minutes late in presenting their claims and

second extremely favourably in favour of respondent employers who are excused from defending their actions by reason of a delay which has not prejudiced them in any way. Nevertheless, in the light of the words of section 111(2) of the 1996 Act and the authorities to whom I have referred, I have no alternative but to dismiss the appeal".

38. The claim was presented outside the relevant time limit. It is therefore dismissed, the Employment Tribunal having no jurisdiction to deal with it. For the sake of completeness there was also no basis on which I could find that the claim had reasonable prospect of success given the jurisdictional issue under section 111 ERA 1996.

Employment Judge Tsamados
27 July 2021