



EMPLOYMENT TRIBUNALS

Claimant
Mr A Brankling

Respondent
Secretary of State for Justice

v

PUBLIC PRELIMINARY HEARING

Heard at: Leeds by CVP

On: 3 April 2023

Before: Employment Judge O'Neill

Appearance:

For the Claimant: In person (with his TU representative Mr J Watson)

For the Respondent: Mr Richard Ryan of Counsel

RESERVED JUDGMENT

The claim for unfair dismissal fails as being out of time and having no reasonable prospect of success I dismiss it for want of jurisdiction.

REASONS

Claims and Issues

1. The claimant has made a claim of unfair dismissal under S94 and S98 Employment Rights Act 1996 (ERA 1996). He had been employed as a prison officer from 1 March 2008 until his dismissal on 18 July 2022, the effective date of termination being agreed between the parties as 18 July 2022.
2. It is agreed Early conciliation started on 27 September 2022 and ended on 29 September 2022. The claim form was presented on 8 November 2022.
3. It is agreed that the normal time limit in this matter should have been 29 October 2022. Under Section 111 ERA 1996 was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination.

4. The ET1 was lodged on 8 November 2022 and is out of time.
5. The matter has been listed to consider whether
 - 5.1 It was reasonably practicable for the claimant to have brought his claim within the normal time limits.
 - 5.2 If not, within what further period would it have been reasonably practicable for the claimant to have submitted his claim.
6. In addition the Tribunal will have to consider the further question of whether the claim was presented within such a reasonable further period?
7. If my finding is that it was reasonably practicable to lodge the claim within time as provided by S111(2)(a) ERA 1996 (as extended by Early Conciliation) or within such further period as determined under S111(2)(b) then I will consider whether the claim should be struck out under rule 37 on the basis that it has no reasonable prospects of success.

Evidence

8. There was a small Bundle of 34 pages comprising pleadings and correspondence with the Tribunal. The Bundle did not contain copies of the emails said to have been sent to the Branch Secretary or to the Solicitors.
9. The claimant and his TU representative, Mr J Watson POA Branch Chairman, gave evidence in answer to questions from me and under cross examination.

Findings

10. The time limit under S111 ERA 1996 was 29 October 2022 but the ET1 was not lodged until 8 November 2022. The claim was lodged out of time.
11. He was a member of the POA and his case was initially the responsibility of a local representative who, before the claim had been lodged, had to undergo major surgery and before the Tribunal deadline passed the papers by email to his Branch Secretary on the HMPS system. Unfortunately, the email went into the 'junk mail' folder of the Branch Secretary and went unnoticed until the date for submission had passed.

Law

12. The test for late unfair dismissal claims is 'reasonably practicable' – S111(2)(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'.

The three month period shall firstly be extended by the Acas early conciliation provisions and secondly by the above provisions. S111(2) provides a high threshold and is strictly applied and the burden of proof is on the Claimant.

13. The respondent referred me to the following cases

- a. **Palmer v Southend on Sea Borough Council** [1984] IRLR 119
- b. **Midland Bank Plc v Samuels** [1992] EAT 672/92
- c. **Schultz v Esso Petroleum Ltd** [1999] IRLR 488
- d. **Bodha v Hampshire Area Health Authority** [1982] ICR 200
- e. **Asda Stores Ltd v Kauser** [2007] UKEAT/0165/07
- f. **Marks and Spencer v Williams-Ryan** 2005 IRLR 565
- g. **Dedman v British Building and Engineering Appliances Ltd** [1974] 1 All ER 520;
- h. **Wall's Meat Co Ltd v Khan** [1978] IRLR 499; **Papparis v Charles Fulton & Co Ltd** [1981] IRLR 104, EAT,
- i. **Trevelyan's (Birmingham) Ltd v Norton** [1991] ICR 488, EAT),
- j. *TU advice:* **Times Newspapers Ltd v O'Regan** [1977] IRLR 101, EAT;
- k. **Syed v Ford Motor Co Ltd** [1979] IRLR 335, IT;
- l. **Alliance & Leicester plc v Kidd** EAT 0078/07;
- m. **Ashcroft v Haberdashers Askes' Boys School** UKEAT/0151/07.

Findings

14. The time limit under S111 ERA 1996 was 29 October 2022 but the ET1 was not lodged until 8 November 2022. The claim was lodged out of time.
15. The claimant was dismissed for gross misconduct on the 18th of July 2022 following a disciplinary hearing and an appeal.
16. The claimant was a member of the POA and his case was initially the responsibility of a local representative who, before the claim had been lodged, and before the Tribunal deadline passed the papers by email to his Branch Secretary on the HMPS system. Unfortunately, the email went into the 'junk mail' folder of the Branch Secretary and went unnoticed until the date for submission had passed. The branch chairman received his diagnosis in or about May 2022 and his operation was scheduled for November and he was winding down his workload in the months leading up to the operation. He cannot put a precise date on when he passed the papers in his possession to the branch secretary but believes it was after the conclusion of the appeal probably in August. He is also uncertain as to what he passed to the branch

secretary but recalls that they spoke and he forewarned the secretary that papers will be coming in.

17. On the 27th of September Application was made to Acas under the early conciliation process by the claimant himself. The claimant was unfamiliar with the procedure and clicked the button asking for the matter to be referred to a tribunal and as a consequence the certificate was issued on the 29th of September 2022 by e-mail sent directly to the claimant. The claimant did this online through the Acas website and accepts that there was information on the a cast site informing him of the tribunal time limits. The claimant accepts that he was aware that there were time limits for the tribunal but was not certain of the precise deadline because of the application of the Acas early conciliation extension. At about the same time the POA's solicitors were contacted although it is not clear from the evidence given today when and by whom this was done.
18. On various dates between the 26th of September 2022 and the 12th of October 2022 the claimant sent to the branch secretary by e-mail papers including the appeals transcript and outcome and the Acas certificate. Although the claimant was sent the Acas certificate directly, he did not immediately recognise what it was although now he is quite sure he passed it to his union representative. On the 10th of October and 12th of October the claimant pressed the branch secretary as to the progress of his case with the solicitor but had no reply to those emails or to his telephone calls about that which followed shortly after.
19. I did not hear evidence directly from the branch secretary. However, the claimant and the branch chairman tell me that it was later discovered that some emails and attachments had gone into the branch secretary's 'junk folder' and were overlooked. The reason given for this was that the branch officials operated through the hmpps email system and the old system did not have a junk folder but a recently introduced new system included a 'junk folder' but the branch secretary was not aware of it or its contents. This is not compatible with the reason given by the branch secretary in an e-mail to the claimant sent on the 9th of November 2022 in which he referred to having suffered a bereavement and personal health as the reason for not being in touch. The branch secretary sent the e-mail on the 9th of November 2022 in response to the claimants e-mail of the 8th of November 2022 in which he had sent the branch secretary a copy of the ET1.
20. In or about October 2022 the claimant also contacted the solicitors directly in a number of telephone calls. The solicitors asked him for the Acas certificate and assured him in terms that time for lodging the ET1 would be extended by virtue of the Acas process and time would not stop running until the certificate had been issued.
21. The claimant says that he was not immediately aware that the e-mail he had received on the 29th of September 2022 was in fact the acas certificate. However the claimant is an articulate and apparently intelligent person and the acas document is clearly headed 'Early Conciliation Certificate' and the body of the document refers twice to 'this certificate'. In the circumstances I find the claimant knew or should have known but this was the Acas certificate the

solicitors were seeking. Similarly the branch secretary on receipt of this document should have recognised it's important and passed it to the solicitors together with the other papers.

22. The claimant had and was entitled to have an expectation that his union would represent him competently. It is reasonable to expect union officials to be aware of the tribunal time limits and to recognise and an Acas certificate.
23. Following a conversation with the solicitor on the 8th of November 2022 the claimant revisited the e-mail of the 29th of September 2022 and forwarded it to the solicitor. He was advised to lodge an ET1 form immediately and sent the link to the tribunal in order to do so. The claimant immediately completed and submitted the form on the 8th of November 2022.

Conclusions

24. The time limit in this case was 29 October 2022 but the ET1 was not lodged until 8 November 2022. The claimant is clearly out of time for the submission of his ET1 form at the Tribunal, and although it was only late by about 10 days the Tribunal time limits are strictly applied.
25. The claimant accepts that he was aware of a general tribunal time limit, that he was capable of using a computer, had applied to a Acas himself for early conciliation online and such time limit information was on that website. He was a member of the Prison Officers Association I'm through them had access to time limited information and advice. It is reasonable to expect trade union officials to know the tribunal time limits and advised their members accordingly. The claimant had knowledge of time limits and access to advice about tribunal time limits. The claimant completed the IT1 and submitted it on the 8th of November without assistance. I find that it was reasonably practicable for him to have done so within the ordinary time limits ie before the 29th of October 2022.
26. Further the claimant had put his case in the hands of his trade union but you have the reasonable expectation but they would look after him and ensure but the time limits were met. The failure of the trade union to properly advise or act promptly on his behalf does not trigger the escape clause provided by section 111(2)(b).
27. The tribunal did not hear from the branch secretary or the solicitors. We know that by the 8th of November 2022 the branch secretary was receiving e-mail from the claimant because on the 9th of November he sent the claimant an e-mail in response to the claimant's e-mail of the previous day enclosing the copy ET1. It was not clear from the evidence of the claimant or the branch chairman at what point and how the branch secretary uncovered the documents in his junk folder. This was in any event not a technical computer issue or fault but a failure of administration on the part of the branch secretary. From the evidence given I cannot say what documents were in the junk folder and when they were

discovered and apart from the Acas certificate whether they provide any excuse or explanation for the late submission of the ET1.

28. The claimant was repeatedly calling the branch secretary and the POA solicitors in the period leading up to the tribunal deadline. In the circumstances I find this was a very unfortunate mix up and communication breakdown between the claimant and his union and with his union solicitors in which the papers particularly the Acas certificate were not passed on in time to alert the claimant of the precise deadline and ensure that the ET1 was lodged in time.
29. Even if this failure to submit the et one form before the 29th of October 2022 or to advise the claimant to do so was entirely the fault of the trade union then the claimant cannot rely on their failure or negligence to show that it was not reasonably practicable to submit a claim form in time the case law is such that a claimant has to take the consequences of the negligence or failure to act by his union.
30. In any event the claimant submitted his own ET1 for unfair dismissal on the 8th of November and there was no reason that he could not have done so before the 29th of October 2022 since he had the means of identifying the time limits in that he was in possession of the acas, the certificate requires no special skill to identify and the claimant who was aware of tribunal time limits in general, had the ways and means of identifying the precise time limit.
31. In the circumstances I conclude that it was reasonably practicable for the claimant to have lodged the claim in time and his claim therefor fails as being out of time and having no reasonable prospect of success I dismiss it for want of jurisdiction.

3 April 2023

Employment Judge O'Neill

5 April 2023

Sent to the parties on:

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For the Tribunal:

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