



EMPLOYMENT TRIBUNALS

Claimant: Mrs Suzy Bush

Respondent: Intimates Lingerie LLP

Heard at: London South, by video

On: 30th March 2023

Before: Employment Judge Reed

Representation

Claimant: In person

Respondent: Mr Sunit Joshi (Solicitor)

JUDGMENT

1. The Employment Tribunal will consider the claimant's claim of unfair dismissal, notwithstanding it having been brought outside the statutory time-limit.
2. This is because, pursuant to section 111(2) Employment Rights Act 1996 it was not reasonably practicable for the claimant to present the claim before the end of the statutory time limit and it was presented within a reasonable period thereafter.

REASONS

Introduction

1. The claimant, Mrs Bush, seeks to bring a claim of unfair dismissal against the respondent, Intimates Lingeries LLP.
2. Mrs Bush was dismissed in July 2020, but the claim form in the current claim was not presented to the tribunal until 18th October 2021. It is therefore significantly out of time.
3. Mrs Bush presented a previous claim to the Tribunal on 25th August 2020. It is in a similar form to the current claim. It was dismissed on 23rd September 2020, because it was brought against a named individual, rather than Intimates Lingerie LLP (which had been the prospective respondent identified on the early conciliation certificate).
4. This public preliminary hearing has considered whether the claim should be dismissed,

on the basis that it is late or whether time should be extended.

Procedure

5. A bundle of documents had been produced by the respondent for the purposes of this hearing, running to 50 pages. References to page numbers in this decision are references to that bundle.
6. In addition, prior to the hearing, I had asked HMCTS staff to carry out a search for documents relating to Mrs Bush previous claim. This had produced a small number of emails between her and the Tribunal, which are set out below in the evidence. Mrs Bush had, of course, seen those emails at the time, but did not initially have them to hand.
7. At the beginning of the hearing, I read the emails in my possession to both parties at dictation speed. Neither party objected to this course. Since this involved a small number of short emails, Mrs Bush had previously seen them and Mr Joshi is an experienced tribunal representative I am satisfied that this was a fair way of proceeding.
8. Later, during a break in the hearing, Mrs Bush was able to locate some relevant emails, which she sent to the Tribunal and to Mr Joshi. These are also set out below.
9. At the beginning of the hearing Mr Joshi declared that, during my previous role as Principal Legal Officer at the Free Representation Unit I had supervised him as a volunteer. I explained to Mrs Bush that it was not unusual for a judge to know a lawyer who appeared before them and that I did not have any current professional relationship with Mr Joshi. In those circumstances I said that I did not believe there was any reason I should not deal with this case. Mrs Bush was content for me to continue.
10. In addition to the documentary evidence, I heard evidence from the claimant on her own behalf.

Findings of Fact

11. I considered all the oral evidence and the documentary evidence to which I was referred. The facts I have found to be material to my conclusions are as follows. All findings of fact are made on the balance of probabilities, that is that they are more likely to be true than not. Since this hearing has related only to the time limit issue, my findings of fact are restricted to those facts which are relevant to that point.
12. It is not in dispute that Mrs Bush was dismissed by the respondent. She was notified of that decision on the 14th July 2020 and told that her employment would terminate on 11th August 2020. This was confirmed in an email on the 14th July 2020, p38.
13. Mrs Bush appealed by letter on the 15th July 2020, p 40. Her appeal was refused by letter on 20th July 2020, p41.
14. On the 23rd July 2020 Mrs Bush notified ACAS in accordance with the Early Conciliation process. An Early Conciliation certificate was issued on 3rd August 2020, p2. The prospective respondent named in the notification was Intimates Lingerie LLP.
15. On the 25th August 2020, Mrs Bush submitted a claim to the Employment Tribunal. This was done using the online form system. That claim, however, named the respondent as Sarah Charlesworth, who I understand to be the owner of Intimate Lingerie LLP. For the purposes of these reasons I will refer to this as 'the original claim'.

16. That claim was rejected by the Tribunal on 23rd September 2020 on the basis that the name of the prospective respondent on the early conciliation certificate was not the same as the name on the claim form. That rejection was sent to Mrs Bush by email. She agrees that she read the email the same day.
17. The email also included a standard tribunal document, titled 'Claim Rejection Early Conciliation: Your Questions Answered'. This includes basic information about why a claim is likely to have been rejected in these circumstances. It also suggests how the problem may be addressed. Three options are suggested:
 - a. Contacting ACAS to obtain an early conciliation certificate
 - b. Applying to reconsider the rejection, which must be done within 14 days
 - c. Appealing the decision to the Employment Appeal Tribunal.
18. It is convenient to note here that, of these three options, only an application for reconsideration would be appropriate in Mrs Bush's situation. Mrs Bush had already obtained an early conciliation certificate naming the correct potential respondent. Her error had been naming a different individual on her claim form. Similarly, there has been no suggestion that there was any error of law in the tribunal's rejection of the claim, so an appeal would not be appropriate.
19. Mrs Bush says that at the time she was uncertain what to do. She was not aware that one option was to submit a new claim, naming the correct respondent. She says that she was looking for employment and also doing some temporary work, which meant she did not give the matter her full attention. As she accepted during her cross-examination, the fact that she had secured temporary work quickly had led her to conclude that she could find a similar job without much difficulty. She had therefore, at least temporarily, decided she did not wish to pursue a Tribunal claim.
20. Mrs Bush, however, changed her mind and made an out of time application to the Tribunal to reconsider the rejection.
21. On the 20th October 2020 Mrs Bush sent the following email to the tribunal:

Hi Helen,

Thank you for your email, please could you let me know what I need to do to reopen this case. I didn't realise I needed to send through my appeal within 14 days. The appeal would be to Intimates Lingerie and wasn't aware Sarah Charlesworth was named.

I am still unemployed.

Kind regards

Suzy

22. Mrs Bush says that, around this time, she also spoke to ACAS and asked them for guidance. She was told, however, that ACAS couldn't do much now the matter had reached the Tribunal.
23. On the 1st February 2021, Mrs Bush sent the following email to the tribunal:

Hi,

With regard to the email trail for my case to be reopened, please could you let me know the status, as I've not heard anything since October 2020. I was told it was being rejected as I'd made the claim to both the company and the director, my mistake.

The reference is PA/LSO/266/2020 ET1, but please do let me know if you require any further information from me.

*Kind regards
Suzy Bush*

24. On the 5th February 2021, Mrs Bush sent the following email to the tribunal:

Hi,

With regard to the email trail for my case to be reopened, please could you let me know the status, as I've not heard anything since October 2020. I was told it was being rejected as I'd made the claim to both the company and the director, my mistake.

The reference is PA/LSO/266/2020 ET1, but please do let me know if you require any further information from me.

*Kind regards
Suzy Bush*

25. On the 9th February 2021 Mrs Bush sent the following email to the tribunal, referring to her previous emails.

*Please could you help, regarding the email trail below.
Thank you
Suzy Bush*

26. On the 21st May 2021, Mrs Bush sent the following email to the tribunal:

Hi,

I would like to enquire what has been happening with my claim that I started last year. Our Ref: PA/LSO/266/2020 ET1 claim form for Mrs S Bush. I believe that I asked for it to be reopened after I received the latter station it had been rejected because I had used two different claimants, as this is something I've never done before so I'm not too sure of the procedures. I realise you are probably inundated with claims, but though I would have heard something by now.

Please let me know if there is anything else I need to do.

*Kind regards
Suzy Bush*

27. In or around August 2021 Mrs Bush had a conversation with a solicitor. This was on an informal basis, rather than a formal instruction. Mrs Bush had mentioned her situation to someone she had met in passing. The solicitor suggested that she probably needed to put a new claim in to the Tribunal. No mention was made at this stage of time-limits or the need to act urgently.

28. It is difficult to be certain when this conversation occurred. There is no contemporaneous documentation and Mrs Bush did not have a clear recollection. At one stage she suggested that the conversation might have occurred in February 2021. Later she said that it had happened a couple of months before she put the claim in, because she recalled thinking about whether she still wished to pursue a claim, given the passage of time, and it took her a couple of months to decide.

29. On balance, I think that this conversation probably occurred sometime during August,

a couple of months before the claim was lodged. It is unlikely that Mrs Bush would have sent the 21st May 2021 email in the form that she did, if she had been told in February she might need to present a new claim.

30. Mrs Bush lodged the current claim to the Employment Tribunal, again using the online system, on 18th October 2021.
31. On the 22nd November 2021 the Employment Tribunal refused Mrs Bush's application to reconsider the dismissal of the original claim. The substantive part of that letter reads as follows:

Your claim was rejected on 23rd of September 2020. As stated in the 'Your Questions Answered' documents enclosed with that rejection, any application for a reconsideration had to be made within 14 days of the date of the rejection letter. You applied for a reconsideration on 1st of February 2021 outside that timeline. No reconsideration will therefore be processed.

32. The reference to applying for reconsideration on 1st of February appears somewhat odd, since it is clear on the evidence before me that Mrs Bush had made some attempt to re-open her case earlier in her email of the 20th October 2020. It is possible that it is an error or it possible that the Judge dealing with the application viewed the 20th October 2020 email as seeking information from the Tribunal rather than an application.

33. On the same day Mrs Bush replied by email as follows:

Hi Nafisa,

I am slightly confused about this, as I received a letter in post a few days ago asking for details of my income etc, making me believe that it had now been reopened. Also it claimed that the respondent was Sarah Charlesworth and in my new claim, she wasn't even mentioned.

I realise that I should have responded within 14 days but at the time I'd found employment and wasn't going to pursue it, but circumstances changed.

Is there anything else I can do?

*Kind regards
Suzy*

34. In cross-examination, it was suggested to Mrs Bush that this email demonstrated that she had decided not to pursue her claim in September / October 2020. Mrs Bush agreed that there had been a point, after her original claim was rejected, that she decided it was not worth pursuing. She had been able to find temping work within a month of her dismissal and felt confident she would be able to find another similar role. In those circumstances, she had felt that she did not want to pursue the claim.
35. By the 20th October 2020, however, she said that she had changed her mind. She said that it had been harder to secure permanent work than she had expected.
36. I accept Mrs Bush's evidence on these points. A decision not to pursue the claim explains why she did not apply for a reconsideration within the time limit to do so. It is clear that she then changed her mind, because she attempted to apply for a reconsideration out of time on the 20th October.

37. Prior to August 2020 Mrs Bush had never made a claim to the Employment Tribunal. She is not a lawyer and had no reason to have knowledge of legal proceedings beyond the basic background knowledge that anyone might pick up.
38. After she was dismissed Mrs Bush looked for information about potentially bringing a claim online. She used search terms like 'Redundancy / Your rights'. She found the ACAS website, which contains basic information on employment law and the Employment Tribunal.
39. In my view, Mrs Bush, from that point, understood the basics of making a claim to the Employment Tribunal. She was aware of the need to go through ACAS Early Conciliation and then to submit a claim to the Tribunal. That is clear from the fact that she did go through that process.
40. I am also satisfied that she was aware of the basics of the three-month deadline. The current ACAS online guidance for bringing a claim includes the following:

Time limits

There are strict time limits for making a claim to an employment tribunal. In most cases, you have 3 months minus 1 day from the date the problem at work happened.

41. There is then a link to more detailed guidance. That includes confirmation that in unfair dismissal time starts to run from the last day of a notice period. It also informs readers that, although claims can be brought out of time, 'in most cases time limits are strictly enforced'.
42. I am satisfied that, although the guidance may have been amended between 2020 and now, guidance of this kind would have been available to Mrs Bush when she read the ACAS website.
43. I am satisfied, however, that Mrs Bush was not aware that, in the situation she found herself in October 2020, one option was to present a new claim. I accept her oral evidence that this did not occur to her, but it is also clear from her actions. As of the 20th October the correspondence makes it plain that she wished to pursue her claim. There was no physical or practical obstacle to presenting a new claim form. If she had been aware that one option was to present a new claim, she would have done so.
44. Mrs Bush candidly accepted that she did not take any further steps to investigate her position or take further advice. She believed that she had done what she could in applying to reconsider the dismissal of her original claim. She periodically chased the Tribunal for an answer, but did not take any other steps.
45. It was therefore a chance encounter in August 2020 that brought the possibility that she might bring a new claim to her attention.

The law

46. The time limit for bringing a claim for unfair dismissal is set out at s111(2) of the Employment Rights Act 1996. This requires that any claim is brought within three months of the effective date of termination.
47. Where an employee is dismissed on notice the effective date of termination is the date on which the notice expires.

48. The three-month deadline is frequently extended by the operation of the Early Conciliation Procedure, which is dealt with in s207B ERA. This is not a case that turns on the detail of that regime, so it can be dealt with briefly. Essentially, s207B operates to 'stop the clock' on the time for bringing a claim while Early Conciliation is ongoing. When Early Conciliation ends, time begins running again. In broad terms, a claimant who following their dismissal spends two weeks in Early Conciliation will have three months and two weeks to submit a claim.
49. Extensions of time to bring a claim are possible in accordance with s111(2)(b) if a) it was not practicable to bring the claim within the normal time limit and b) it was presented within a reasonable period thereafter. It is therefore a two stage test and the limbs must be considered separately.
50. The definition of and approach to the concept of 'reasonably practicability' and extensions of time has been the subject of extensive appellate comment. I have considered in particular the guidance laid down in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, which concluded that the concept of 'not reasonably practicable' fell between the extremes of what is physically possible to achieve on the one hand and a simple question of what was reasonable on the other. I must consider broadly whether it was reasonably feasible to present the claim to the Tribunal within the time limit.
51. Since Mrs Bush relies in particular on her lack of knowledge of her rights and the Tribunal process I have considered the approach to such questions required by the Court of Appeal in *Wall's Meat Co Ltd v Khan* [1978] IRLR 499. Ignorance of a right to bring a claim, how to present a claim to the Tribunal or the relevant deadlines may all mean that it was not reasonably practicable to present a claim in time. In everyday language, it is not reasonably practicable to do something, such as present a claim, if you do not know of the option to do so, do not know how it is to be done or are unaware that there are strict time-limits involved.
52. For any lack of knowledge to make it not reasonably practicable to present a claim, that lack of knowledge must be reasonable. When deciding whether lack of knowledge is reasonable I must consider whether the Claimant has acted reasonably in making enquiries as to her rights and how they may be enforced. A Claimant cannot rely on reasonable ignorance if that lack of knowledge has become unreasonable because they have failed to take reasonable steps to find out where they stood.
53. As the Court of Appeal noted in *Wall's Meat Co Ltd v Khan* in considering whether a Claimant has acted reasonably in making enquires there is likely to be an important practical difference between the different forms of ignorance. Where a Claimant does not know they have a right, they are hardly likely to make enquires about how to exercise that right. If, however, a Claimant knows of their rights they will often act be acting unreasonably if they fail to investigate how to pursue those rights.
54. *Wall's Meat Co Ltd v Khan* is generally cited for the general principles it established, as set out above. In the context of this case it is worth noting the facts of Mr Khan's case and what the Court of Appeal said about them. Mr Khan was dismissed for a physical altercation in the workplace. He went to a labour exchange to seek unemployment pay. He was told that he would not receive that for six weeks, but that it would go to a Tribunal. The reference to a Tribunal referred to a challenge to the six-week delay unemployment pay. He did not realise this and believed that it related to a claim for unfair dismissal. It was only at the Tribunal when he was told that it had no jurisdiction over any claim for unfair dismissal that he realised his error.
55. The Court of Appeal upheld the Industrial Tribunal's finding that, in those circumstances, it had not been reasonably practicable for Mr Khan to present the claim in time. This is a useful illustration of the need to focus on the particular knowledge of

a particular claimant in a particular case and how that state of knowledge affected their ability to present a claim. Similarly, the particular knowledge of an individual claimant is likely to be central to any consideration of whether their lack of knowledge was reasonable, particularly in the context of the need to make reasonable enquiries.

56. Since I have referred to a potential error in the Tribunal's order of 22nd November 2021, it is appropriate to record that I have born in mind that this order is not the subject of any challenge before me and is not relevant to the question of any extension of time under s111(2). Procedurally it would be inappropriate for consideration of an extension of time to become a back door route to challenging that decision outside the appropriate channels of reconsideration or appeal of that decision.

Conclusion

57. The three-month time-limit to submit a claim for unfair dismissal began on 11th August 2020, when Mrs Bush's notice expired. The Early Conciliation period had already ended at that point so there was no extension under s207B. The deadline was therefore 10th November 2020.

58. This claim was not presented until 18th October 2021. It is therefore out of time.

Was it reasonably practicable to present the claim in time?

59. I have concluded it was not.
60. This is not a case where there was any physical or medical impediment to presenting the claim within time. At all relevant points, Mrs Bell was capable of taking the necessary steps to bring a claim to the Employment Tribunal. She did so on the 25th August 2020, well within the time-limit.
61. The difficult that rendered it not reasonably practicable was a particular form of ignorance. Once Mrs Bush's original claim form had been rejected, she had two options open to her. First, to request a reconsideration, within the 14-day deadline. Second, to bring a new claim, naming the correct respondent, within the original deadline for presenting her claim.
62. At the point that the original claim was rejected on the 23rd September 2020 she had ample time to present a new claim. Nearly two months remained. I have accepted her evidence that the only reason that she did not do so was that, at that time, she did not realise that it was an option.
63. I also accept that this ignorance was reasonable. To a lawyer, the possibility of presenting a new claim would be an obvious solution once the time to request a reconsideration of the rejection had passed. But it was not a possibility that would readily occur to many litigants in person.
64. I also do not think it was a form of ignorance where the requirement on Mrs Bush to make reasonable enquires meant that her continued ignorance was or became unreasonable.
65. First, the nature of the ignorance made it hard to identify or to resolve. The difficulty was not that Mrs Bush did not know something, such as the deadline for bringing a claim, what form to fill in or which Court / Tribunal to approach. These are matters that are easily identified and, once identified, can be straightforwardly resolved by an online search, which Mrs Bush would have been more than capable of conducting.

66. This was a problem of a quite different kind: it simply did not occur to Mrs Bush that presenting a new claim was a possibility. This was a form of unknown unknown in that Mrs Bush did not realise that she had failed to identify such a possibility. That meant that she was not conscious that she could or should make further investigations.
67. Second, this was exacerbated by the fact that she believed that she was pursuing the option open to her. She was aware that she had missed the deadline for applying for a reconsideration, but had sought to do so out of time by her email on the 20th October 2020. Although the information provided by the Tribunal was accurate, in that it referred to the possibility of applying to reconsider, it had the practical effect of directing Mrs Bush down that path, rather than seeking alternative solutions. This was a reasonable approach for her to take in her circumstances. She had not received a reply from the Tribunal, but believed (accurately) that this was likely to arise from the exceptional pressures and difficulties created by the Covid-19 pandemic.
68. Overall, therefore, I have concluded that Mrs Bush was not aware that she could present a new claim to the Employment Tribunal and that this was a form of ignorance. Considering all of her circumstances that ignorance was reasonable and meant that it was not reasonably practicable for her present her claim within the statutory time limit.
69. If I had needed to decide whether it was reasonably practicable for Mrs Bush to apply for reconsideration within the 14-day time limit I would have found that it was. She had been provided with the necessary information by the Tribunal. Although she was busy, mere busyness falls well short of something that might mean it was not reasonably practicable to take a step in legal proceedings. Similarly, her decision, at that stage, that she did not wish to pursue a claim was a choice.
70. That, however, is not the question before me. My focus must be on whether it was reasonably practicable to present the current claim in time. The fact that it was practicable to do something else within a different time limit— and that Mrs Bush did not do that thing – is not directly relevant to the time-limit question.

Was the claim presented within a reasonable further period?

71. By a narrow margin, I have concluded that it was, notwithstanding the very long delay that mean the claim was presented nearly a year late.
72. This was only reasonable, because of the very particular circumstances of this case. Mrs Bush had begun to take steps to revive her claim much earlier, in the context of applying for reconsideration out of time on 20th October 2020. She did not receive any substantive answer to that application until 22nd November 2021, after she had already made her new claim.
73. This meant that she had not been put on notice that her attempt to revive the claim had failed, which might have alerted her to the need to consider alternative steps. Her various attempts to chase up her application had received no response.
74. Mrs Bush, correctly, understood that the silence from the Tribunal was unusual and represented the exceptional pressures created by the Covid-19 pandemic. The Tribunal's failure to respond, however, created the misleading impression that she was not in a situation that required urgent action.
75. The danger and need for urgency would likely have been obvious to a lawyer and certainly to anyone experienced in Tribunal procedure. An employment litigator would have recognised that there was no active claim before the Employment Tribunal, that the application to reconsider had been out of time and that the original deadline had passed. They would have been alive to the need to consider and to take any available

option that might remedy the situation.

76. The urgency was not obvious to Mrs Bush and given the confluence of events I have concluded that this was reasonable. She remained, in my view, reasonably ignorant of the possibility of presenting a new claim until she spoke to a solicitor in August.
77. That, however, is not determinative of the reasonable further period question. This requires further consideration of the circumstances more generally.
78. I have considered the very long delay and the context of the short original time limit. I have also considered Mrs Bush's attempts to follow up or chase her original application. I find that she did make such attempts, but certainly did not act with urgency and that significantly more could have been done. Both of these factors are against the claim being presented within a reasonable further period.
79. Against that, I have considered that Mrs Bush remained reasonably ignorant of the possibility of bringing a new claim. This, together with the lack of response from the Employment Tribunal are important elements of the context in which she was acting. She was also influenced by her understanding of the general difficulties caused by the Covid-19 pandemic and its impact on the Tribunal.
80. Also of great significance is the further delay, of a couple of months, in presenting the current claim after Mrs Bush became aware of the possibility. This is a significant further delay, which also points away from the claim being presented within a reasonable further period. Having noted that, in my view it must also be judged in the context that a) Mrs Bush still had an outstanding application to the Tribunal at that stage and b) no mention had been made of the time-limit or the need for urgency in the informal advice she received.
81. Taking all of this together, I have concluded that the claim was presented with a reasonable further period – albeit by a narrow margin.

12th June 2023
Employment Judge Reed