EMPLOYMENT TRIBUNALS

Claimant: Mrs B Kistle

Respondent: H Tempest Limited

Heard at: **Bristol (by video – VHS)** **On:** **25 January 2024**

Before: **Employment Judge Livesey**

Representation:
Claimant: In person
Respondent: Mrs Kitley, solicitor

JUDGMENT

The Claimant's claim was presented out of time under s. 111 of the Employment Rights Act and article 7 of the Extension of Jurisdiction Order 1994 in circumstances where it was reasonably practicable for it to have been presented in time and it is therefore dismissed.

REASONS

1. Background

1.1 By a claim form presented on 24 June 2023, the Claimant brought complaints of constructive unfair dismissal and breach of contract relating to notice pay. She had been employed between April 2017 and 30 January 2023. She contacted ACAS on 3 May and had been issued with her early conciliation certificate on 14 June. Within the Claim Form, she acknowledged that it had been brought out of time and attempted to explain her delay.

1.2 The Respondent also raised the limitation issue in its Response of 2 August 2023. The matter was referred to Employment Judge Roper who decided to list this preliminary hearing to determine the jurisdictional time point.

2. Relevant Principles

2.1 A complaint to a tribunal of unfair dismissal has to have been presented in accordance with s. 111 of the Act;

"*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 a 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."

There is a similar provision within the Extension of Jurisdiction Order 1994 in respect of the complaint of breach of contract relating to notice (article 7).

2.2 The legal test was therefore a hard one to meet on the face of the wording of the Act. It required a consideration of whether it had been reasonably feasible for the claim to have been issued in time. A tribunal was entitled to take a liberal approach (*Marks & Spencer-v-Williams-Ryan* [2005] EWCA Civ 470 and *Northamptonshire County Council-v-Entwhistle* [2010] IRLR 740), but it nevertheless had to apply the wording of the statute to the facts.

2.3 The onus was on the Claimant; "*That imposes a duty upon* [her] *to show precisely why it was that* [she] *did not present* [her] *complaint*" (*Porter-v-Bandridge Ltd* [1978] ICR 943, CA).

2.4 The question of what was or was not reasonably practicable was essentially one of fact for the tribunal to decide. The leading authority was the decision of the Court of Appeal in *Palmer and Saunders-v-Southend-on-Sea Borough Council* [1984] IRLR 119, CA in which May LJ undertook a comprehensive review of the authorities, and proposed a test of '*reasonable feasibility*'.

"[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done…… Perhaps to read the word "practicable" as the equivalent of "feasible"…… and to ask colloquially and untrammelled by too much legal logic - "was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?" - is the best approach to the correct application of the relevant subsection."

2.5 The possible factors were many and various, and as May LJ stated, they could not have been exhaustively described. They depended upon the circumstances of each case. He nevertheless listed a number of considerations which might have been investigated (at page 125) which included the manner of, and reason for, the dismissal; whether the employer's conciliatory appeals 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 employee; 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 complaint in time.

2.6 When considering whether or not a particular step was reasonably practicable or feasible, it was necessary for the tribunal, (as the Court of Appeal said in *Schultz-v-Esso Petroleum Ltd* [1999] 3 All ER 338, [1999] IRLR 488) to consider the question 'against the background of the surrounding circumstances and the aim to be achieved'. This was what the 'injection of the qualification of reasonableness required'. The issue in *Schultz* was whether it had been reasonably practicable for the claimant to have presented his claim in time in circumstances where (a) he had tried in the early stages of the limitation period to appeal internally against his dismissal, and (b) although he was physically capable of giving instructions to his solicitor for the first seven weeks of the three-month period, he was too ill to do so for the last six weeks. The tribunal and the EAT both held that it had been reasonably practicable, but the Court of Appeal disagreed and overturned the decision. According to Potter LJ, the tribunal, by relying upon what was physically possible during the first seven weeks, failed to have regard to the comments of May LJ about reasonable feasibility in *Palmer and Saunders*. Moreover, the tribunal failed to consider the surrounding circumstances.

2.7 It would not have been reasonably practicable for a claimant to have issued a claim until they were aware of the facts giving him or her grounds to have applied. It was not usually an excuse, however, for a claimant to argue that they were not aware of their *right* to bring a claim. The reasonableness of their state of knowledge would have to be considered. There was an obligation upon a claimant to take reasonable steps to seek information and advice about the enforcement of their rights once they knew of their existence (*Trevelyans (Birmingham) Ltd-v-Norton* [1991]ICR 488m at 491).

2.8 If a claimant instructed legal advisers and there was a delay through their failure to act, a tribunal would have to examine whether the claimant or the advisers were at fault. The question as to whether or not the litigant was fixed with the error of his advisers may depend upon the level of skill possessed by the adviser which, again, will be a question of fact.

2.9 It had been long established that claimants were affixed with the negligence of their professional advisers (*Dedman-v-British Building* [1973] IRLR 379, confirmed in the context of employment litigation most recently in *BLISS Residential Care Ltd-v-Fellows* [2023] EAT 59), but the principle has also been extended to union advisers (*Alliance & Leicester-v-Kidd* UKEAT/0078/07 and *Cullinane-v-Balfour Beatty* UKEAT/0537/10) and the CAB (*Riley-v-Tesco* [1979] ICR 323, CA). However, the source of the advice and the level of skill held by the advisor may be factors (*Theobald-v-Royal Bank of Scotland* [2007] All ER (D) 4).

2.10 In *Harvey's Household Linens-v-Benson* [1974] ICR 306 and *Alexanders Holdings-v-Methven* UKEAT/782/93, claimants were able to pursue their claims having received inaccurate advice from civil servants within different government departments. A similar approach was taken in respect of advice received from ACAS in *DHL-v-Fazackerley* UKEAT/0019/18. The distinction drawn in *Theobald* between situations in which advisers actually act for claimants and those in which they merely advise (with the claimant retaining control) has since been rejected (*T Mobile-v-Singleton* [2011] All ER (D) 12).

2.11 If it had not been reasonably practicable to have presented the claim time, the tribunal may allow an extension, but only for such a further period as was considered reasonable. A consideration of that issue generally involved similar considerations to the threshold test. Such an assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly (see *Cullinane-v-Balfour Beatty Engineering Services Ltd* EAT 0537/10). Tribunals always had to bear in mind the general principle that litigation ought to have been progressed efficiently and without delay.

3. Evidence, discussion and conclusions

3.1 Although no directions had been given for the filing of evidence in relation to the jurisdictional issue, the Claimant gave evidence in relation to the events which led to her late submission of her claim.

3.2 She said that;

3.2.1 She had resigned on 30 January 2023. She did so orally. She did not work any notice, although she appears to have been paid in lieu. The limitation clock therefore started clicking and ran to 29 April;
3.2.2 She had no knowledge of limitation periods in the employment tribunals at that stage, but a friend advised her to speak to ACAS;
3.2.3 She rang ACAS on 2 February. She was then advised to speak to a solicitor but she was also '*sure*' that she was then told about the limitation period of three months;
3.2.4 She was also advised at some early point by ACAS (whether on 2 February or soon after) to inform her employer of the reasons for her resignation;
3.2.5 She approached solicitors, Messrs Coodes, on 14 February and spoke to a Ms Marinova who said that a Mr Sayers could help. She took the relevant documentation to them that day or very soon thereafter;
3.2.6 There was then a delay in anyone getting back to her. When they did, on 13 March, she was advised that Mr Sayers had left the Firm. Another solicitor was recommended; Ms Rowe at Murrell Associates;
3.2.7 She telephoned Ms Rowe sometime before 31 March. She was prepared to help in principle. The Claimant then forwarded her paperwork to her;
3.2.8 On 31 March, Ms Rowe emailed her with a breakdown of her costs, but the Claimant considered them to have been too high and she decided to proceed alone;
3.2.9 On 12 April, she acted on ACAS' advice and gave the Respondent the reasons for her resignation. She did not receive a response;
3.2.10 She then contacted ACAS again between 31 March and 5 April and told them that she had spoken to a solicitor. She was advised to fill out an Early Conciliation Form and was provided with a link on 5 April;
3.2.11 Having completed the on line form on 5 April or soon thereafter, she attempted to send it. She accepted in evidence that she must have made a mistake. She received no receipt from ACAS;

3.2.12 She therefore telephoned them, but not until a day or two before 29 April. She eventually got through and had it confirmed that no form had been received;

3.2.13 She had to re-complete it and it was then effectively received on 3 May. She did not see any option for her to have requested a certificate immediately, rather than wait for ACAS to contact her employer;

3.2.14 She received her ACAS Certificate on 14 June;

3.2.15 She then issued her claim on 24 June, a further 10 days after receipt of the Certificate. She explained that further delay on the basis that there had been negotiations over settlement. She had expected a further exchange on 19 June. It had not come. She therefore issued on the 24th.

3.3 The claim was issued nearly 2 months late (29 April to 24 June). The Claimant did not gain any extension under the early conciliation provisions as she had not contacted ACAS effectively within the initial three month period.

3.4 In the circumstances set out above, it could not have been said that it had not been feasible for the claim to have been issued within 3 months of her resignation or, in this case, that it had not been feasible for her to have contacted ACAS within the first three months so as to have benefitted from an extension. In particular;

3.4.1 It had been feasible for the Claimant to have chased solicitors sooner, although, since she did not ultimately avail herself of their services, that was simply time wasted;

3.4.2 It had been feasible for her to have completed the ACAS on line form correctly on or about 5 April;

3.4.3 It had been feasible for her to have done so *before* 5 April. ACAS had not *prevented* her from doing so;

3.4.4 It had been feasible for her to have attempted to re-complete it and/or contact ACAS sooner than a few days before the limitation period expired. Nearly 28 days elapsed between her first attempt and that the cut off date on 29 April.

3.5 Further, she did not issue the claim within a further period which was reasonable. Critically, having received her form, she tarried for a further 10 days before issuing.

3.6 The claim had not been issued late as a result of bad or inaccurate advice from ACAS or solicitors. The Claimant candidly accepted that she had received the key information about time limits quite early on. It was regretful that she allowed time to become lost due to inactivity or errors of her own.

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Employment Judge Livesey
Date 25 January 2024

Judgment & reasons sent to the parties on 06 February 2024

For the Tribunal Office