EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr O Ileola **v** **North Middlesex University Hospital NHS Trust**

Heard at: Watford Employment Tribunal (in person)

On: 15 October 2024
Before: Employment Judge French

Appearances:
For the Claimant: Nr M Isaiah, lay representative
For the Respondent: Mr B Jones, counsel

JUDGMENT

1. The claim was not presented within the applicable time limit. It was reasonably practicable to do so. The claim is therefore dismissed.

2. The respondent's application for a costs order is refused.

3. Reasons having been given orally at the hearing, the claimant requested written reasons pursuant to rule 62(3) of the Employment Tribunals Rules of Procedure 2013 and these are provided below.

REASONS

Introduction

1. The matter was before me for a preliminary hearing in order for me to determine time limits in this claim. It is a claim presented on 13 March 2024 and the complaint is one of ordinary unfair dismissal. ACAS were notified on 25 February 2024 and issued an early conciliation certificate on 7 March 2024.

The Law

Time Limits in Unfair dismissal cases

2. The time for presenting a complaint of unfair dismissal is determined by s.111(2) of the Employment Rights Act 1996 which provides:-

(2) 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 207(B) (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a).

Not reasonably practicable

3. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. This "imposes a duty upon him to show precisely why it was that he did not present his complaint"- Porter v Bandridge Ltd 1978 ICR 943, CA. "The relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done - Lady Smith in Asda Stores Ltd v Kauser EAT 0165/07.

4. What is reasonably practicable is a question of fact and so a matter for the tribunal to decide- Wall's Meat Co Ltd v Khan 1979 ICR 52, CA: 'The test is empirical and involves no legal concept. Practical common sense is the keynote"- Lord Justice Shaw.

5. As Lord Scarman commented in Dedman v British Building and Engineering Appliances Ltd 1974 ICR 53, CA, where a claimant pleads ignorance as to his or her rights, the tribunal must ask further questions: 'What were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived?'

6. The existence of an impending internal appeal was not in itself sufficient to justify a finding that it was not reasonably practicable to present a complaint to a tribunal within the time limit -Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA.

7. A list of possible considerations, in addition to the mere fact of an internal appeal procedure, was set out by May LJ in Palmer v Southend-on-Sea Borough Council [1984] IRLR 119 at 125, [1984] ICR 372 at 385.

8. Examples of additional factors from the case law include: the claimant's belief that she had to conclude her internal appeal before starting tribunal proceedings was partly due to insufficient and misleading advice given by the employers, Marks & Spencer v Williams-Ryan [2005] EWCA Civ 470, [2005] IRLR 562, [2005] ICR 1293 and where the employer had created confusion around the internal appeal, Cambridge and Peterborough Foundation NHS Trust v Crouchman UKEAT/0108/09, [2009] ICR 1306.

Such further reasonable period

9. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was

presented 'within such further period as the tribunal considers reasonable'.

10. In University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12 the EAT emphasised that this limb of S.111(2)(b) does not require the tribunal to be satisfied that the claimant presented the claim as soon as reasonably practicable after the expiry of the time limit in order to allow the claim to proceed. Rather, it requires it to apply the less stringent test of asking whether the claim was presented within a reasonable time after the time limit expired.

11. In Cullinane v Balfour Beatty Engineering Services Ltd and anor EAT 0537/10 Mr Justice Underhill, then President of the EAT, commented that the question of whether the period between expiry of the time limit and the eventual presentation of a claim is reasonable requires an objective consideration of the factors causing the delay and of what period should reasonably be allowed in those circumstances for proceedings to be instituted. Crucially, this assessment must always be made against the general background of the primary time limit and the strong public interest in claims being brought promptly.

12. In Nolan v Balfour Beatty Engineering Services EAT 0109/11 the EAT reiterated this last point, stating that tribunals, when considering whether to extend time under S.111(2)(b), should always bear in mind the general principle that litigation should be progressed efficiently and without delay. The EAT went on to hold that, when deciding what would have been a reasonable time within which to present a late claim, tribunals should have regard to all the circumstances of a case, including what the claimant did; what he or she knew, or reasonably ought to have known, about time limits; and why it was that the further delay occurred.

Conclusions

13. I start by looking at the effective date of termination (EDT). There is a dispute in this regard, the respondent's position being that it was 16 November 2023, that being two days from the date of the dismissal letter which was 14 November 2023.

14. In the ET1, at box 5.1 the claimant states that the EDT was 16 November 2023 which would accord with what the respondent says. However, in submissions before the tribunal now the claimant suggests that the effective date of termination was actually 20 November 2024 because that is when the dismissal letter was received.

15. I am not satisfied that there is a clear explanation as to why it is now being said that the letter was received on 20 November 2023 and why the claimant has gone behind what is said on the ET1 save for the claimant suggesting that it must be a typo and should actually say 14 November 2023, which was the date of the dismissal letter itself.

16. I can see the dismissal letter itself at page 43 of the preliminary hearing bundle. I can see that it is dated 14 November 2023. I accept the respondent's position that that was sent by first class post and recorded

delivery for which deemed service would have been 16 November 2023. There is nothing before me to offer an explanation as to why there was then a delay until 20 November 2023. I accept on the face of it, that delays can occur with Royal Mail but, of course, this is being raised for the first time in submissions for the purposes of this hearing and does not concur with what was accepted in the ET1.

17. Therefore, in all of those circumstances, I do find that the effective date of termination was 16 November 2023; that is per the ET1 and as per the deemed date of service from the letter being sent on 14 November 2023.

18. I will say, in relation to the effective date of termination, it is somewhat academic in any event because, even on the claimant's account with an EDT of 20 November 2023, the deadline for submission would have been 19 February 2024. ACAS are not contacted until 25 February 2024 and the ET1 is submitted on 14 March 2024. So, even on the claimant's account, ACAS were contacted when the claim was already out of time.

19. Having established the effective date of termination, I go on to consider whether the claim was presented within 3 months of that date. Taking the EDT as 16 November 2023, the claim should have been presented by 15 February 2024. The claim was presented on the 13 March 2024, and therefore on the face of it, is out of time. On my finding, when ACAS were contacted on 25th February 2024, the claim was some 10 days out of time.

20. I therefore go on to consider whether it was reasonably practicable to have submitted the claim within the three month time period. In that regard the claimant relies on three principal factors in relation to why it was not reasonably practicable and I address each one in turn.

Health and bereavement

21. The claimant's submission is that the claimant's health was such that he was, in his representative's words, incapacitated. He was effectively unable to submit the claim form. I am taken to medical evidence attached to the submissions in support of that assertion and that medical evidence consists of GP fit notes around the claimant's fitness to work.

22. What I do not have is any GP records which document the claimant's presentation at that time; I have no commentary or assessment from the doctor, save for the very brief words on the fit notes, and nor do I have any letter from the GP which would support that the claimant was medically unable to present a claim form during that period.

23. Whilst I am primarily concerned with the time period when limitation was expiring, I have no medical evidence from the period immediately following the dismissal up until 3 January 2024 when the first fit note is issued so I do not have any medical evidence, even in the form of fit notes, to support that it was not reasonably practicable in the months of November or December to have presented the claim form.

24. I then do have a medical certificate that signs the claimant off of work, the condition being noted as "bereavement and depression" from 3 January 2024 to 2 February 2024. I have no difficultly in accepting that the claimant

had depression and was suffering a bereavement in light of that fit note but that medical evidence does not support that the claimant was not able to submit a claim form because of his condition. Being unfit to work, as is stated in that medical evidence is, in my view, very different from being incapacitated such to mean the claimant was unable to present a claim.

25. The next medical evidence covers the period 3 February 2024 to 2 March 2024 and refers to 'foot pain and depression'. I then have a further certificate covering the period 4 March 2024 to 3 April 2024. This again refers to 'foot pain and depression.' Again, I accept medically that those conditions exist based on that fit note, but it does not say that either of those conditions were such that it would make the claimant unable to present his claim.

26. Indeed, during the period 4 March 2024 to 3 April 2024 for which the claimant is signed off with depression, which is the same condition relied on by the claimant to say he was unable to present his claim within limitation, I note that he does in fact present his claim. So, we have the third medical certificate which covers the period 4 March to 3 April, and he does present his claim on 14 March 2024. In my view, that therefore does not suggest that he was unable to present the claim because of said conditions.

27. In submissions, I am told that the claimant is incapacitated during this period due to his mental health condition. Whilst I acknowledge and recognise that it is possible for a person to be prevented from submitting a claim due to depression, it is for the claimant to prove that it was not reasonably practicable to submit the claim and, on the medical evidence before me I am not satisfied that his conditions were such to make him unable to submit his claim.

28. Again, in that regard, I do not have any GP records, any commentary or any observation by the GP. Further, I have no witness statement from the claimant to say his condition was such. I have submissions on his behalf, but I do not have a signed statement to say this is what I was experiencing. Nor is the claimant here today to even take any evidence on oath as to the effect.

29. This is also a case where I am being asked to find that the claimant was incapacitated during a period where I note that he does lodge an appeal against his dismissal and later does go on to seek advice from a lay representative and, as I have stated, also then does submit his ET1 during a period where he is signed off as unfit to work. I am then being asked to rely on that medical evidence to support the fact that the claimant was incapacitated and in fact unable to present his claim. Therefore, based on the medical evidence, I am not satisfied that it was not reasonably practicable for the claimant to have submitted his claim within the three-month period because of his medical condition.

Internal appeal

30. The second ground relied on is that the claimant was awaiting the internal appeal. As outlined case law confirms that in itself is not a reason to make

it not reasonably practicable to have submitted the claim. In any event, I note that the appeal outcome is in May 2024, that is at page 61 of the bundle, and so, on the basis that the ET1 is actually presented on 13 March 2024, the claimant does not wait to receive the outcome of the appeal, as he submits his ET1 on 13 March 2024.

31. In terms of the internal appeal, there is no suggestion that the claimant was misled in any way as to the position. He is not positively told by the respondent or anyone else that he needs to wait for the outcome of the internal process. I am told that this was his understanding until he makes contact with his lay representative. However, I reject that suggestion because I do not accept that this is a case where the claimant is ignorant of his rights.

32. At page 53 there is an email to the respondent as early as 22 November 2023 in which he asserts that he has been unfairly dismissed. He also talks about the need to contact ACAS and the right to bring a claim to a tribunal and so this is a case, in my view, where the claimant either had some knowledge or certainly as early as November 2023 had carried out some research into the matter because he is asserting such knowledge within that email. If it is the case that the claimant's position is that he knew of the right but not the time limit, I consider that he could have quite easily discovered this from a search and the information is readily available to him. This is particularly so given my finding that the claimant either has some knowledge or has carried out some research in November 2023.

Delay by Acas and lack of legal knowledge

33. The third issue relied on is the delay by ACAS and a lack of legal knowledge. This is two-fold really, but it comes under the same heading within the submissions which is why I address it as one.

34. I have not fully understood the claimant's point in relation to the delay by ACAS because at the point of contact with ACAS, the claim is already out of time. They are then approached on 25 February 2024, and they issue the certificate on 7 March 2024, so whilst the certificate is not immediately issued, I do not consider that there is significant delay.

35. There is then, the assertion of lack of legal knowledge. Whilst I acknowledge the claimant is a litigant in person and make some allowance for the same it does not mean that the claimant is exempt from procedural rules. In this case, on my finding, the claimant either has some knowledge, given the email sent as early as November 2023, or has conducted some research at early stage and could have done the same here to establish the time limit.

36. This is also not a case, on my finding, that he is incapacitated such to make him unable to submit the claim and, for the same reasons on the medical evidence, I do not consider that his depression was such that he was unable to carry out that research and afford himself with the knowledge. Again, at those material times he is able to lodge his appeal and then he does contact a lay representative.

37. In all of the circumstances, I am not satisfied that it was not reasonably

practicable for the claimant to have submitted his claim form within the three month time limit. The claim was therefore presented out of time and the tribunal has no jurisdiction to hear it. As such the claim is dismissed.

38. I will go on to make this final observation that, even if it was not reasonably practicable for the claimant to have submitted the claim in the three-month period, he would still need to submit it in such further reasonable period. That does not mean, as soon as possible, but a reasonable time after the time limit has expired. In this case the claimant admits in his ET1 that when he approaches his lay representative he is informed of the need for expediency.

39. I appreciate that it will take some time to prepare an ET1, as indicated by the claimant's representative who indicated that it took time to take instructions. However, in my view, this does not need to await the certificate from ACAS, this could be done whilst awaiting the ACAS certificate and once the certificate is then issued there is then a further one-week period before the claimant submits his claim.

40. This is against a background where the claim is already out of time when ACAS were contacted. In those circumstances, and on the claimant being aware of the need for expediency on his own admission, I do not consider that the claim was presented within a further reasonable period and the claim would also be out of time for that reason.

41. Having given Judgment, the respondent sought their costs of proceedings pursuant to Rule 76 of the Employment Tribunal Rules of Procedure 2013. It is made on the basis that the claim had no reasonable prospects of success and, as such, I should make an award for all of the costs that have been incurred by the respondent.

42. In the alternative, it is made on the basis that it was unreasonable for the claimant not to have accepted the offer (made by letter of 28 August 2024) to effectively drop hands and walk away.

43. I am not satisfied that this is a claim where there were no reasonable prospects of success. Clearly, time limits are relevant and if the claim is not brought in time the tribunal does not have jurisdiction. I have had to carefully consider matters today and I had to finely balance the arguments that I heard. Ultimately, I found that the claim could not proceed but I do not consider that there was absolutely no reasonable argument in what was presented by the claimant. I have accepted that depression is a possible reason why it may not have been reasonably practicable to present the claim and, ultimately, the claimant has not succeeded on that argument because I consider it is not supported by the medical evidence provided. For the same reasons, I do not think it was unreasonable for the claimant not to have accepted the offer made on 28 August 2024. In those circumstances I do not consider that this is a case where it would be appropriate to make an award of costs.

44. I am also entitled to take into account the claimant's means to meet such an order under Rule 84. In that regard I am told that whilst he is now employed, indeed by his lay representative, he is currently signed off sick and is in receipt of statutory sick pay. In support of that I do have a fitness for work certificate which was provided with the submissions that were put forward by the claimant; that is a sick note from 25 September 2024 signing him off until

23 October 2024, so I consider that that submission is supported by that medical evidence and it seems therefore that the claimant would have very limited availability to meet any costs order in any event.

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Employment Judge French

Date: 8 November 2024

Judgment sent to the parties on
28 November 2024

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T Cadman

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For the Tribunal office

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