Case Number: 1401973/2020
(V)

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Dr C Mesnage	**v**	Solent University

Heard at: **Southampton (by video)** **On: 9 November 2020**

Before: **Employment Judge Dawson**

Appearances
For the claimant: Representing himself
For the respondent: Ms Hollins, Solicitor

JUDGMENT having been sent to the parties on 25 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Issues

1. In this case the claimant brings a claim of unfair dismissal against the respondent. The issue for determination at this hearing is whether or not the claim was presented in time.

2. The claim is only of unfair dismissal and therefore the time limit which must apply is that in section 111 of the Employment Rights Act 1996. The decision that I am giving has nothing to do with the merits of Dr Mesnage's claim which may be a good claim or weak claim. It is purely about time limits.

The Law

3. In respect of a claim for unfair dismissal, section 97 Employment Rights Act 1996 provides

> (1) Subject to the following provisions of this section, in this Part *"the effective date of termination"* —
>
> (a) in relation to an employee whose contract of employment is terminated by notice, whether given by his employer or by the employee, means the date on which the notice expires,
>
> (b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect, and
>
> (c) in relation to an employee who is employed under a limited-term contract which terminates by virtue of the limiting event without being renewed under the same contract, means the date on which the termination takes effect.

4. Section 111 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.

5. The leading authority is the decision of the Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council [1984] 1 All ER 945*, *[1984] IRLR 119*, *[1984] ICR 372, CA*. In that case, May LJ stated

> "[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—different, for instance, from its construction in the context of the legislation relating to factories: compare *Marshall v Gotham Co Ltd [1954] AC 360, HL*. In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" as Sir John Brightman did in [*Singh v Post Office [1973] ICR 437, NIRC*] 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."

6. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'.

7. A claimant's complete ignorance of his or her right to claim unfair dismissal may make it not reasonably practicable to present a claim in time, but the claimant's ignorance must itself be reasonable. It was held in *Dedman v British Building and Engineering Appliances Ltd* 1974 ICR 53 that 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?' In *Porter v Bandridge Ltd* 1978 ICR 943 the majority of the Court of Appeal held that the correct test is not whether the claimant knew of his or her rights but whether he or she ought to have known of them.

8. A claimant who is aware of his or her rights will generally be taken to have been put on inquiry as to the time limit. In *Trevelyans (Birmingham) Ltd v Norton* 1991 ICR 488, Mr Justice Wood said that, when a claimant knows of his or her right to complain of unfair dismissal, he or she is under an obligation to seek information and advice about how to enforce that right.

9. In *Marks and Spencer plc v Williams-Ryan* 2005 ICR 1293, CA, the claimant believed that she had to exhaust the internal appeal procedure before she could bring an unfair dismissal claim. She had taken advice from the Citizens Advice Bureau. Her employer had provided her with material about an unfair dismissal claim but it had not mentioned the time limit. The Court of Appeal held that the employment tribunal had not erred in holding that it was not reasonably practicable for the claim to be presented within the three-month timescale. Lord Phillips said: "I would hesitate to say that an employee can never pray in aid the fact that he was misled by advice from someone at a CAB. It seems to me that this may well depend on who it was who gave the advice and in what circumstances. Certainly, the mere fact of seeking advice from a CAB cannot, as a matter of law, rule out the possibility of demonstrating that it was not reasonably practicable to make a timely application to an employment tribunal.". He went on to say 'Were these conclusions on the part of the tribunal perverse? I have concluded that they were not. I think the findings were generous to the respondent, but they were not outside the ambit of conclusions that a tribunal could properly reach on all the facts before them"

10. In respect of Early Conciliation the Employment Rights Act 1996 provides as follows:

> **207B Extension of time limits to facilitate conciliation before institution of proceedings**
>
> (1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2)In this section—

a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4) If a time limit set by a relevant provision would (if not extended by this subsection)expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

Findings of Fact

11. The claimant was employed by the respondent as a Lecturer in Data Science. He was dismissed without notice on 19 December 2019 and that was the effective date of termination of his employment.

12. Apart from the early conciliation provisions the limitation date would have been 18 March 2020.

13. The date on which the claim was notified to ACAS was 3 March 2020 and the date of the ACAS certificate was 18 March 2020.

14. Applying s207B(4) of the early conciliation provisions, the limitation period of 18 March would fall between the date when the claim was notified to ACAS and the date of the ACAS certificate, thus the new limitation period is one month from the date of the ACAS certificate which is 18 April 2020.

15. Applying s207B(3) gives an earlier date because there is a fifteen day period between 3 and 18 March 2020. If those 15 days are and added to 18 March the date is 2 April.

16. I take the later date as being the relevant date namely 18 April 2020.

17. The claim was presented on 20 April 2020 and I have to ask myself whether it was reasonably practicable to present the claim in time.

18. The claimant knew that he was dismissed on 19 December 2019. It is also clear that he knew that he had a possible claim of unfair dismissal. On 3 April 2020 he wrote to Dr Farwell stating "I would like to know what I need to do in order to make the claim for unfair dismissal at the Employment Tribunal".

19. Dr Farwell was the claimant's trade union representative and he was an experienced representative as is apparent from page 18 of the bundle. It is clear that he has been a UCU member since 1986, he was elected chair of Solent UCU in 2007. His biography states that he is a Solent UCU lead caseworker, chair of joint negotiation and consultation committee at Solent University and the UCU regional secretary southern region. I find that during the relevant period he was acting for the claimant- at least in the sense that ACAS was communicating with him and the ACAS certificate was sent to him on 18 March.

20. Dr Farwell did not reply to the email of 3 April 2020 until 15 April when he said "the appeal hearing was held on 24 February 2020 and you received notification of the outcome in a letter from Bridget Woolven on 25 February. You subsequently applied to ACAS for early conciliation on 3 March and I received the ACAS certificate attached on 18 March. You have three months less one day from the date 24 February 2020 of the incident (unfair dismissal) to make a claim to an Employment Tribunal. The claim needs to be made on or before 23 May 2020". He enclosed a link for making a claim to the tribunal.

21. I have heard no evidence from Dr Farwell nor any explanation as to the passage of time in this case. It seems to me that the email which I have quoted- of 15 April 2020 - contains a mistake. It is wrong in so far as it states that the time limit runs from the date of the appeal. Time runs from the effective date of termination which was the date of dismissal.

22. The claimant said in closing, and I accept for the purposes of this decision, that he acted on that email believing that the claim need not be submitted until May and that had he been told of the correct position in that email he would have submitted the claim in time; it would have been a rush but it could have been done.

23. In his witness statement the claimant advances other reasons for the delay in presenting the claim. He says firstly, that there was a delay with the University dealing with his appeal against his dismissal. There was some delay. I do not know the reason for that. The claimant has not suggested that he believed that he needed the appeal to be resolved before he could bring a claim to the Employment Tribunal. Even if he had said that I do not consider that belief would be reasonable given the claimant's access to his trade union and also the information about time limits which is readily available on the internet. The fact that the internal appeal was concluded by 24 February 2020 meant that the claim could easily have been presented in time.

24. The claimant also says that because of coronavirus his ability to submit his claim on time was affected. The "lockdown" in respect of coronavirus was 18 March 2020. In my judgment the claimant had plenty of time to access the internet before then, but even thereafter his evidence was that, although he was living on a boat, the marina in which the boat was moored had wifi access. The wifi was intermittent in its connectivity but the claimant did not

suggest to me that the signal never worked and indeed it is clear that he was able to send the email of 5 April 2020 to Dr Farwell. I find there is no evidence that the pandemic had any impact on the ability of the claimant to present his claim in time.

25. The claimant also says that the delay between 18 March 2020 when the ACAS certificate was sent to Dr Farwell and Dr Farwell sending it to him on 15 April 2020 was a reason for the delay. I am not satisfied that there was any good reason for the delay by Dr Farwell in sending the certificate on to the claimant but, in any event, if the claimant was waiting for that certificate he could have chased Dr Farwell for it. Although I accept that there was a delay in the claimant getting the certificate from Dr Farrell, he himself accepted that if he had known of the time limit, he could still have submitted his claim in time.

26. I find that the claimant could easily have found out the correct information as to the time limit for presentation of claims between 19 December 2019 and 15 April 2020 when he received the email from Dr Farwell with the incorrect information in it. The claimant knew that he may have a claim of unfair dismissal, he had access to the internet and he is clearly an intelligent perso who was able to find out information about how and when to bring a claim to the tribunal.

27. I accept, however, that from 15 April 2020 the claimant was being misled by the incorrect advice that he had received from Dr Farwell. However, Dr Farwell was not in the same position as a Citizens Advice Bureau representative. The claimant was a member of the union and the union had offered to provide advice to the claimant. Dr Farwell was an experienced representative and could easily have discovered the correct position as to the law.

28. In my judgment, and on the facts of this case, Dr Farwell's mistake as to time limits has to be attributed to the claimant- or to put the matter another way the claimant cannot avoid the consequences of the effect of time limits by saying "it wasn't my fault, it was my representative's fault".

29. I must ask myself the question of whether it was reasonably feasible for the claim to be presented in time and the answer is that it was. The claimant himself could have discovered the time limits that are applicable to the claim or his representative could have told him the correct time limit. It was reasonably feasible for both things to happen and so it was reasonably practicable for the claim to be presented in time. For those reasons I regret that the claim must be rejected as being presented out of time.

Employment Judge Dawson

Date: 14 December 2020

Note - Reasons for the Judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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