



EMPLOYMENT TRIBUNALS

Claimant: Mr A Bottomley
Respondent: Exclusive Rooms Lettings Limited

PRELIMINARY HEARING

HELD AT: London South (CVP) **ON:** 31 May 2022
BEFORE: Employment Judge Hart

REPRESENTATION:

Claimant: Mr Bottomley, in person
Respondent: Ms Nicol, Consultant

JUDGMENT

The Judgment of the Tribunal is that:

1. The tribunal does not have jurisdiction to consider the claimant's claim of unfair dismissal. The claim was submitted outside the statutory time limits and it was reasonably practicable for it to have been submitted in time.
2. The tribunal does not have jurisdiction to consider the claimant's claim for holiday pay (under unlawful deductions of wages, breach of contract and / or working time regulations). The claim was submitted outside the appropriate statutory time limits and it was reasonably practicable for it to have been submitted in time.

REASONS

Introduction

1. The claimant was dismissed on 30 April 2020. He submitted claims for unfair dismissal and holiday pay on 30 July 2020. On 31 May 2022, the matter was listed for an open preliminary hearing to determine jurisdiction on the grounds that the claims were out of time. Judgment was reserved.

The Issues

2. It was agreed with the parties at the outset that the issues to determine were as follows:

2.1 Whether the claims for unfair dismissal and / or holiday pay were out of time?

2.2 If the claim/s were out to time, was it 'not reasonably practicable' for the claim/s to be presented before the end of the relevant period of three months?

2.3 If yes, were the claim/s presented within such further period as the tribunal considers reasonable?

It was agreed that issue 2.1 was a matter for submissions as to the test to be applied when calculating time limits. Further issue 2.3 was not in dispute, the respondent accepting that after the time limit had expired the claimant had presented his claim within a further period that would be considered reasonable.

3. The tribunal confirmed with the parties that it was not being asked to deal with any application to strike out due to non-compliance with directions, determine the substantive claim or consider an application for costs.

The hearing

4. The tribunal received two bundles one from the claimant comprising of 72 pages and the other from the respondent comprising of 110 pages. The claimant gave evidence on his own behalf. Both parties made closing submissions.

Factual findings

5. The respondent is a residential lettings and management company owned by Mr Kevin Shaw. The claimant commenced employment on 17 November 2017 as a lettings manager.
6. By a letter dated 9 April 2020, the claimant was dismissed with notice 'by reason of redundancy'. He was informed that his final day of employment was 30 April 2020 (effective date of termination). On termination of his employment the claimant was required to return the work laptop. The claimant did not have his own computer, but did have a Smartphone.
7. The claimant stated that prior to his dismissal he had conducted online research regarding his entitlement to claim unfair dismissal and was aware that there was a 3-month time limit to submit a claim to the tribunal.
8. Following termination of his employment the claimant applied for several posts, including a number of senior management positions requiring significant time to complete the forms.
9. Two to three weeks prior to the deadline for submitting his claim, the claimant accepted that he was able to obtain advice. He received email advice from the pro bono centre at BPP.com (the university) and had spoken for 20-30 minutes to a 'friend of a friend' who was an employment professional working in HR. The claimant stated that he was not advised of the deadline for submitting a claim.
10. On the 28 July 2020 the claimant emailed the respondent a letter before action amounting to two and a half pages. The letter sought a settlement of eight months'

salary amounting to £16,666 and outstanding holiday pay. The claimant sent this using a laptop that he had borrowed for that purpose from his brother. The letter stated that he intended to commence legal action the next day, 29 July 2020.

11. However, the claimant did not commence his claim on the 29 July 2020. He stated that this was because he did not have access to a laptop on the 29 July 2020 and because he had been advised that he should provide the respondent with an opportunity to respond before making a claim. The reason why the claimant did not have access a laptop on the 29 July 2020 was because he was borrowing his brother's laptop and his brother let him down. Alternatives, such as libraries and internet cafés were unavailable since they were closed due to the COVID lockdown.

12. On 30 July 2020 the claimant entered into ACAS Early Conciliation and was issued with a certificate the same day. He then submitted his claim form.

13. The reasons that the claimant gave for the claim being out of time were:

(a) That he could not afford legal advice due to loss of employment, it was the first COVID lockdown and therefore access to pro bono lawyers was limited.

(b) That he had limited access to a computer, and was dependent on borrowing his brother's laptop to complete and / or download the claim form.

(c) In March 2020, the claimant's mother had an accident which required the claimant to provide her with extra care. The claimant accepted in evidence that his caring responsibilities were not such as to prevent him being able to submit his claim in time.

The Law

14. For unfair dismissal claims, section 111(2) of the Employment Rights Act 1996 provides that "*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” (my emphasis).*

15. For unlawful deduction of wages (holiday) claims, section 23(2) of the Employment Rights Act 1996 provides that “*an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with–*

- (a) *in the case of a complaint relating to a deduction by the employer, the date of payment of their wages from which the deduction or the last deduction in a series was made...*

Section 23(4) provides that: “*where the employment tribunal is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable” (my emphasis).*

16. For breach of contract (holiday) claims, article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides that: “*an employment tribunal shall not entertain a complaint in respect of an employee’s contract claim unless it is presented –*

- (a) *within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, ...*

...

- (c) *where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within the applicable period, within such further period as the tribunal considers reasonable” (my emphasis).*

17. For working time regulations (holiday) claims, section 30(2) of the Working Time Regulations 1998 provides that: “... *an employment tribunal shall not consider a complaint under this regulation unless it is presented–*

- (a) *before the end of the period of three months ... beginning with the date on which it is alleged that the exercise of the right should have been permitted (or*

in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made;

- (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' (my emphasis).*

Calculation of time limits

18. Caselaw has established that when a claim is to be presented within a period 'beginning with' a particular date, that date must be included in the calculation of the time limit: **Hammond v Haigh Castle & Co. Ltd** [1973] ICR 148. In the case of **University of Cambridge v Murray** [1993] ICR 460, EAT, the three-month period for an unfair dismissal claim had begun on 30 April and ended on 29 July. The claim submitted on 30 July was therefore one day out of time. The dates in **Murray** are identical to those in the case before the tribunal.

19. This contrasts with the formulation for the presentation of a response under the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 schedule 1 (ET Rules), rule 4(3) which provides that: "*where any act is required to be, or maybe, done within a certain number of days of or from an event, the date of the event shall not be included in the calculation*" (my emphasis).

20. The time limits may only be extended under the ACAS Early Conciliation provisions if the conciliation process is entered into within the primary time limits.

Tribunal discretion to accept a claim that is out of time

21. Where a claim for unfair dismissal, or holiday pay (whether under unlawful deduction of wages, breach of contract or the working time regulations) has been submitted out of time the tribunal may extend the primary time limit:

- (a) Where it was not reasonably practicable to present the claim in time, and
- (b) The claim was presented within a further reasonable period.

The burden of proof rests on the employee.

22. The phrase 'reasonably practicable' does not mean either reasonable or physically possible, rather it means something like 'reasonably feasible', **Palmer v Southend on Sea BC** [1984] 1 W.L.R 1129. It 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, **Asda Stores v Kauser** UKEAT/0165/07.
23. Where a litigant is aware of the right to make a claim, that puts them on enquiry. Where that litigant then makes an error in presenting their claim out of time due to a mistaken belief as regards the applicable time limit, the question is whether the mistaken belief itself was reasonably held, **Walls Meat Co Limited v Khan** [1979] ICR 532 (CA). As Lord Denning, Master of the Rolls, stated at paragraph 15:
"... It is simply to ask this question: Had the man just cause or excuse for not presenting his complaint within the prescribed time? Ignorance of his rights — or ignorance of the time limit — is not just cause or excuse, unless it appears that he or his advisors could not reasonably be expected to have been aware of them. If he or his advisors could reasonably have been so expected, it was his or their fault, and he must take the consequences".
24. Thus the question is not whether the claimant was aware of the date for presenting his claim, but whether he ought to have been aware taking into account all the surrounding circumstances. This may appear harsh but it is a well-established principle. It is a principle that applies not just to the mistaken belief of a litigant but also the mistaken belief of a legal or professional advisor if that litigant relies on that advice: **Dedman v British Building and Engineering Appliance Ltd** [1974] ICR 53, CA.

Conclusions

Calculation of time limits

25. The tribunal finds that the claimant used the wrong method to calculate the last date for presenting his claim. He relied on the calculation of time under the ER Rules, rule 4, and failed to appreciate that rule 4 is not a general rule but only applies to the calculation of time limits under the ET Rules themselves. He also

failed to appreciate that rule 4 contains different wording to the statutory provisions dealing with the computing of time for unfair dismissal and the holiday pay claims. Rule 4 addresses the calculation of time 'within' a specified period, and therefore excludes the date of the event in the calculation. Whereas the statutory provisions dealing with unfair dismissal and holiday pay refer to time running from a period 'beginning with' a particular date. It is clear from the statutory text, and confirmed in caselaw, that the date of the event is included in the calculation of the time period. In the claimant's case the date of the event was the date of his dismissal (30 April 2020), the claimant submitted his claim on the 30 July 2020, therefore the tribunal finds that the claimant's claim was presented one day out of time.

Whether it was not reasonable practicable to submit the claim in time?

26. The tribunal considered carefully the factors relied upon by the claimant as to why it was not reasonably practicable to submit his claim in time. The tribunal reminded itself that the burden of proof rests on the claimant.

27. The tribunal did not consider the claimant's mother's illness to be a relevant factor, since the claimant accepted that although it limited his free time it did not prevent him from submitting the claim in time. Indeed over the same period the claimant was able to make written applications for employment and submit a detailed letter before action to the respondent.

28. The tribunal does not accept the claimant's evidence that the reason (in part) that he did not submit a claim on the 29 July 2020 was because he had been advised that he should provide the respondent with an opportunity to respond before making a claim. This is because this evidence is inconsistent with the wording of his letter of the 28 July 2020 which stated that he would be submitting a claim on the 29 July 2020. Also the claimant did not explain why, having obtained advice 2-3 weeks earlier, he had left it to the last minute to follow this advice. The claimant also did not explain why he could not have entered into ACAS early conciliation within the time limit, which would have stopped the clock to enable conciliation to be explored before a claim was submitted.

29. The tribunal accepts the claimant's evidence of the financial pressures on him (having lost his income), that he did not have a computer and therefore was reliant on his brother's laptop. The tribunal notes that the dismissal occurred during the first COVID-19 lockdown and that it was more difficult to access internet cafes and libraries, although it is also noted that restrictions had eased by July 2020. Further the tribunal accepts the claimant's evidence that his brother let him down by failing to provide him with his laptop on the 29 July 2020. However the tribunal does not believe that this was the reason why the claim was not submitted on that date. On the claimant's own account he did have access to a laptop on the 28 July and 30 July 2020, and had access to a laptop prior to this date to contact pro-bono legal advice and apply for employment. If he had realised that the deadline was the 29 July 2020, the tribunal believes it would have been reasonably feasible for the claimant to have ensured that he had access to a laptop on that date, either by ensuring that his brother was aware that having the laptop on that date was urgent, making alternative arrangements, or submitting his claim before the 29 July 2020. In any event all he was required to do by 29 July 2020 was to commence ACAS early conciliation, and the claimant has provided no explanation as to why that could not have been achieved even without access to a laptop.
30. The tribunal considers that the real reason the claimant failed to submit this claim in time is that he wrongly computed the time limit. He genuinely thought that the day of the event in question did not count in the calculation and therefore that the deadline was the 30 July 2020, not the 29 July 2020.
31. The tribunal then went on to consider whether the claimant ought to have known what the correct date was, in other words whether he made proper enquiries. The claimant is not a lawyer or an employment specialist, so the tribunal accepts that he did not know how time was to be calculated. On the other hand the tribunal notes from the witness statement provided in the bundle that the claimant was university educated. Also his evidence was that he was aware of his right to bring a claim having researched this prior to dismissal, was aware of the 3-month time limit and the date of termination. There is no evidence to suggest that he was misled by the respondent employer or by any other agency or adviser.

32. The tribunal accepts that it was more difficult to obtain legal advice during the first COVID lockdown in March 2020, however the claimant was able to access some advice 2-3 weeks prior to the deadline, this would have provided him with the opportunity to enquire about how to calculate the time limit. The tribunal also notes that the claimant had access to the internet through his Smartphone and therefore could have accessed websites which explain the calculation of employment tribunal time limits. He also had access to a telephone and therefore could have phoned ACAS, for example, for advice. Therefore the tribunal concludes that the claimant failed to make proper use of the resources available to him regarding the calculation of time limits. The claimant's error is that he proceeded on a false assumption that the calculation of time was as set out in the tribunal rules. Had he made proper enquiries he would not have made this error.

Whether claim submitted within a further reasonable period.

33. In this case the second limb of the test was not disputed. If the tribunal had accepted that it was 'not reasonably practicable' for the claim to be submitted in time then it would have gone on to hold that the claim was submitted within a further reasonable period, that being 1 day.

34. In the light of the tribunal's findings set out above, the tribunal does not have jurisdiction to consider the claims for unfair dismissal and holiday pay.

Employment Judge Hart

Date: 03 August 2022

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