



Case Number: 2300303/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant

and

Respondent

Mr M Atkinson

Sky Retail Stores Ltd

PRELIMINARY HEARING

HELD AT London South

ON 18 July 2018

EMPLOYMENT JUDGE PHILLIPS

Appearances

For Claimant: In person

For Respondent: Mr B Gray, of Counsel

JUDGMENT

1. *The Respondent's application that the Claimant's claim is out of time and should be struck out is rejected.*

REASONS

1. The Claimant, who commenced employment with the Respondent on 6 December 2010, brings by his ET1 Claim Form, which was filed on 23 January 2018, a complaint that he was unfairly dismissed by the Respondent, arising out of his dismissal on 24th July 2017. The Respondent says the dismissal was a fair dismissal on the ground of capability.
2. The Respondent seeks at this hearing to strike out the Claimant's ET1 under s 111(2) Employment Rights Act 1996, on the basis that it was submitted 6 weeks out of time. The Claimant was affirmed and gave oral evidence as to the circumstances behind the date of his submission of his ET1. Mr Gray cross-examined the Claimant about these matters and I also had the opportunity of asking the Claimant some questions.

3. With regard to an unfair dismissal claim, complaints for unfair dismissal must normally be presented to the tribunal within three months starting with the effective date of termination (EDT), (which can be extended by the operation of the Early Conciliation process) or within such further period as the tribunal considers reasonable where it was not reasonably practicable for the complaint to be presented within three months (ERA 1996, s 111).
4. Mr Gray explained that the effective date of termination (EDT) of the Claimant's employment with the Respondent was 24 July 2017. Under the relevant provisions of the Enterprise and Regulatory Reform Act 2013 and the Employment Tribunal (Early Conciliation) Regulations 2014 and the subsequent amendments to the Employment Tribunals Act 1996 and the ERA 1996, the ET1 would normally need to be submitted within 3 months from the EDT. However that time limit can be extended by the Early Conciliation provisions. In this case, the Early Conciliation certificate ran from 10 October 2017 until 10 November 2017. On that basis, the Claimant should have put in his ET1 by no later than 1 month after the end of the Early Conciliation process, ie by 10 December 2017, but in fact he did not do so until 23 January 2018, some 6 weeks out of time. Therefore there is a clear case for the ET1 being struck out, unless the Tribunal exercises its discretionary powers under s 111(2) ERA. Section 111(2) imposes a two part test: (1) was it reasonably practicable to submit the ET1 in time – if so, that is an end of the matter; if it was not, then (2) was the ET1 submitted within such further period as the Tribunal considers reasonable.
5. Mr Atkinson, who was accompanied by his brother to the hearing, explained that after the Early Conciliation process had ended and he had received his certificate he had contacted ACAS by phone and had been told that he had three months after the Early Conciliation in which to put in his ET1. He said that he had not checked this any further and relied upon it. He accepted in cross-examination that it might have possible that he had misunderstood what he was told, but was clear that was what he had understood. He said he did his application by post as he found the on-line process complicated. He said that his own documentation was scattered around his home, including the loft, and (1) he wanted to review it to be sure it was worth him taking it forward; and (2) he had been trying to get some of his emails from the Respondent, who had refused, and he had been chasing up. He had waited until 10 October to submit for Early Conciliation because that was when the outcome of his appeal was notified to him. He had phoned ACAS at this point and been told what he needed to do and had immediately applied for the EC Certificate. When the Certificate was received he had called ACAS again and it was during this call he was told he had three months from the date of the EC letter.
6. Mr Atkinson's brother, who was not on oath, said that his brother suffered at this time from anxiety and stress and questioned himself as to whether he should make the claim. He said that they found the process of submitting the ET1 claim very confusing, and that they had done it as quickly as they could.

7. Mr Gray submitted that on the basis of the Claimant's evidence:
- a. This was not a reasonable mistake – the Claimant had done no other research;
 - b. This mistake did not make it not reasonably practicable to have submitted the ET1 in time;
 - c. The ET1 was short and factual and was not legally complicated and would not have taken any time to put together;
 - d. Therefore he could have done this within the permitted time and it was reasonably practicable for him to have submitted it before 10 December;
 - e. Even on the Claimant's own account he had taken 2 ½ months after the Early Conciliation certificate was received, and although he had not left it to the very end, he had left it close to the eleventh hour and as such he did not act in a timely fashion after the deadline expired;
 - f. tracking down and waiting for documents is not a sufficient excuse;
 - g. The Claimant had been assisted by his brother.

Conclusion

8. Ignorance of time limits is not a defence or excuse, but if there are reasonable grounds for that ignorance, such that it makes it hard to comply with the Rules that can be considered relevant. In this case, the Claimant sought advice from ACAS. ACAS is not in my judgment to be regarded in the same way as a solicitor or the CAB might be in advising "a client", where they and the client should effectively be seen as one and the same if incorrect advice was given. Here, ACAS is an independent advisory agency, and arguably should not have been giving advice in this way.
9. Once that advice was given and received, it is difficult to see what more the Claimant could have been expected to do. He sought advice, was apparently given misleading advice, and acted within the time limit that he had been advised of, and did not leave it to the last minute. Within that period he sought to get access to documents in order to satisfy himself it was worth him taking his claim forward.
10. On that basis, in my judgment, (1) it was not reasonably practicable for him to have submitted his ET1 in time, and (2) he did submit it within such further period as I considered to be reasonable, namely the three month time limit had had been told about. On that basis I was willing to exercise my discretion under s 111 ERA and accept jurisdiction in this case and allow the Claimant's ET1 to proceed.

Employment Judge Phillips
19 July 2018,