



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Miss K Long

v

The Wrigley Company

Heard at: Bury St Edmunds

On: 19 February 2018

Before: Employment Judge Laidler

Appearances

For the Claimant: In person.

For the Respondent: Mr J Dawson, Counsel.

JUDGMENT

- 1. It was not reasonably practicable for the complaint to be presented before the 30 July 2017**
- 2. The complaint was presented to the tribunal within such further period as the tribunal considers reasonable**
- 3. The tribunal does therefore have jurisdiction to consider the complaint of unfair dismissal.**
- 4. Case Management orders are set out below.**

REASONS

1. At a preliminary hearing on 24 November 2017 Employment Judge Lang listed an open preliminary hearing before an Employment Judge sitting alone on 19 February 2018 to determine whether the complaint of unfair dismissal was presented to the Employment Tribunal within the appropriate time limit (having regard to the ACAS Early Conciliation scheme) or within such further period as the Tribunal considers reasonable, if the Tribunal is satisfied it was not reasonably practicable for the complaint to be presented in time.
2. The preliminary hearing was listed only to deal with the claim of unfair dismissal, the claimant having withdrawn a complaint of disability discrimination.

3. At this hearing it was confirmed that all agreed that the requisite time by which the claim should have been presented (taking into account early conciliation) was the 30 July 2017.
4. Evidence was heard from the claimant and submissions made on behalf of both parties. In the course of hearing the evidence and submissions it appeared to the Judge that it was necessary to make further enquiries. Details of this will be set out below. As a result, further information has come to light and the parties were invited by letter of 28 April 2018 to submit their comments in respect of that. A letter dated 9 May 2018 was received on behalf of the respondent and no further communication from the claimant. All this information has been taken into account in coming to this reserved decision.
5. The claimant gave evidence that she sent the claim form on Thursday 27 July 2017 by Royal Mail tracked delivery. She had attempted to complete it online on Wednesday 26 July 2017 but that was the date of the Unison decision and it was not possible to present the claim online. As a matter of record the Judge confirmed to the parties from the Presidential Direction of 2 November 2017 that in fact it was not possible to present an online claim during the period 26-31 July 2017.
6. The claimant confirmed that she believed she has started to complete the form on the Tuesday, but was in the middle of two dissertations from University and revising as well as trying to deal with new employment. She appreciated that she had left it late but they were her reasons for so doing. She recalled that she left work on 27 July to post the form and although recalling that she had done this by Royal Mail tracking service once she had received acknowledgement of receipt of the claim she did not keep the certificate of posting.
7. The claimant was adamant that she never visited the Tribunal Office but dealt with it on the phone. The claimant telephoned the Tribunal Office she said on the 31 July 2017 and produced a copy of a screen shot from her phone showing that she had telephoned a number 0300 123 1024 on the following dates; 16 August at 2.15pm, 31 July at 8.52am (4 minutes 44 seconds) and again on 31 July at 8.49am (but only 19 seconds). There was also one on 31 July at 8.48am but the copy presented to the Tribunal does not show how long that took. The claimant's evidence was that she had tried 3 times as she couldn't get through and this copy document appears to confirm that submission. She was keen to speak to someone about the submission.
8. The claimant's evidence was that the Tribunal could not confirm receipt of the ET1 but that she was told not to worry as they were dealing with a backlog and there was a "grace period" as she was so close to the deadline. They told her that there was no need to call back. They were dealing with the backlog and as it had gone by tracked post she was told that it would be fine. The claimant said that she checked the tracking

reference on Friday 28 July and this said that it had been delivered. She did not print off the certificate but had at that point the tracking receipt.

9. The claimant was adamant that she did not submit the claim online. She did not see the need to do so as she had the tracking number.
10. The Judge made it clear to the parties that there was no envelope retained on the file.
11. What there was however on the file, was the ET1 form date stamped "CPF E&W 2 August 2017", an internal tribunal service form stating that the ET1 had been received on 2 August 2017 but received in the Watford office on 3 August 2017.
12. It was this information which led the Judge to determine it was only appropriate to reserve the decision and an instruction was given to the administration to send a letter to the Central Office in Leicester requesting the following information:-

"E J Laidler has instructed that I write to you in connection with the above matter with the request that you answer the queries that appear below. The background is as follows.

The ET file has an email from you of the 3 August 2017 timed at 15.39 from a G Lowe.

Attached to it is a document headed 'MoJ ETSsystem Live/XForms Pro/Internal Forms/Form.

This records:

'Thank you for your submission. It has been forwarded to the Watford office who will contact you in due course

...

Submission date: 03.08/2017:12.57...'

The ET file also has an ET1 form on it that is stamped 'CPF E & W 2 AUG 2017'.

The queries are:

1. How was the ET1 submitted to Arnhem House? Was it online or by post?
2. What does the date stamp 'CPF E & W 2 AUG 2017 signify?
3. If that is the date received why does the MoJ ET System Live document state submission date 03/08/2017?

As this query relates to a current hearing which has been adjourned it would be appreciated if you could reply as soon as possible and within 7 days of the date of this letter."

13. The response that was received to that letter was dated 1 March 2018 and stated:

“ET1 was received by post on 02/08/17 and it was registered on JADU on 03/08/17”

And that was from a clerical officer at Arnhem House, Leicester.

14. The Judge directed that a letter be sent to the parties providing that information to them and inviting any further submissions. That was sent on 28 April 2018. As has been noted above the only response was from the respondent on 9 May 2018.
15. Some of the statements made by the respondent’s solicitors in their letter of 9 May 2018 are not strictly accurate. They state at the bottom of the first page of their letter that the claimant’s claim form was stamped as received by the Watford Employment Tribunal on 2 August and that this was confirmed by the Employment Tribunal Central Office following the Judges enquiries. That is not the case. What the Central Office has confirmed is that it received it on 2 August. It appears from the tribunal file that Watford received it on 3 August.
16. The respondent’s solicitors also suggest at point 3 on the second page of their letter that the claimant suggested the tribunal office confirmed receipt of the documents on 31 July 2017. That is not the Judge’s note of the claimant’s evidence. The Judge’s note is as reflected above in the Tribunal’s findings. The claimant was re-assured about the position but was not told that the document had been received.
17. The Tribunal has also noticed when considering this matter that the document the claimant produced of her telephone records (a copy of which was also given to the respondent) shows that she telephoned 0300 123 1024. That is not the telephone number of the Watford Employment Tribunal. That is a 01923 telephone number. The 0300 number is the telephone number of the Employment Tribunal General Enquiries Line in Leicester.

Relevant Law

18. S.111(2) of the Employment Rights Act 1996 provides that:

- “(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.”

19. The Tribunal was not referred to any authorities by the parties, but has in particular considered Consignia Plc v Sealy [2002] IRLR 624. The following is from the head note:

Until a simpler regime for the service of documents such as that which is now available to the courts is introduced in respect of employment tribunals, the following guidance may be helpful in determining whether an unfair dismissal application was presented within the prescribed time period:

1. Section 111(2) of the Employment Rights Act 1996 refers to “presenting” a complaint to a tribunal. It is now well established that a complaint is “presented” when it arrives at the Central Office of Employment Tribunals or at an office of the tribunals.
2. If a complainant or his or her agent proves that it was impossible to present a complaint in this way before the end of the time prescribed by s.111(2)(a) – for example because the office was found to be locked at a weekend and it did not have a letter box – it will be possible to argue that it was not reasonably practicable for the complaint to be presented within the prescribed period.
3. If a complainant chooses to present a complaint by sending it by post, presentation will be assumed to have been effected, unless the contrary is proved, at the time when the letter would be delivered in the ordinary course of post.
4. If the letter is sent by first class post, it is now legitimate to adapt the approach contained in Civil Procedure Rule 6.7 and conclude that in the ordinary course of post it will be delivered on the second day after it was posted (excluding Sundays, Bank Holidays, Christmas Day and Good Friday).
5. If the letter does not arrive at the time when it would be expected to arrive in the ordinary course of post, but is unexpectedly delayed, a tribunal may conclude that it was not reasonably practicable for the complaint to be presented within the prescribed period.
6. If a form is date-stamped on a Monday by a tribunal office so as to be outside a three-month period which ends on the Saturday or Sunday, it will be open to a tribunal to find as a fact that it was posted by first class post not later than the Thursday and arrived on the Saturday, alternatively to extend time as a matter of discretion if satisfied that the letter was posted by first class post not later than the Thursday.
7. This regime does not allow for any unusual subjective expectation, whether based on inside knowledge of the postal system or on lay experience of what happens in practice, to the effect that a letter posted by first class post may arrive earlier than the second day after it is posted. The “normal and expected” result of posting a letter must be objectively, not subjectively, assessed and it is that the letter will arrive at its destination in the *ordinary* course of post. A complainant

knows that he or she is taking a risk if the complaint is posted by first class post on the day before the guillotine falls, and it would be absurd to hold that it was not reasonably practicable for it to be presented in time if it arrives in the ordinary course of post on the second day after it was posted. The post will have taken its usual course and nothing unexpected will have occurred.

8. The strict litigation rule in *Godwin v Swindon Borough Council*, that even if it can be proved that a document arrived by post on a day earlier than the deemed date of service, it must nevertheless be deemed to have been served on the deemed date of service, does not apply in employment tribunal cases. If a complainant takes a chance and the letter containing the complaint happens to arrive at the tribunal office on the day after it was posted and therefore within the permitted three-month period, it will have been presented in time.”
20. Although this case was heard under the old Rules, and is somewhat historic, the guidance given is still of assistance. It has continued to be referred to in other more recent decisions.

Submissions

21. Reference has already been made to the letter from the respondent. In oral submissions Counsel for the respondent accepted that the claimant had not presented as someone who was seeking to mislead the Tribunal. It was however his submission that all the evidence pointed to the claimant having sought to present the ET1 and when she had not been able to do so going back and completing the form on line at a later date. There is no explanation as to why the form is on file from Arnhem House if the claimant did not complete it. That he suggested cast doubt on the claimant's case that she submitted it by post. There was no envelope on the tribunal file. It was far more likely the claimant never posted the letter which is why there is no certificate of posting and no envelope, but only the electronic version. Although the claimant presented credibly, it was not considered consistent with the contemporaneous evidence on the file.
22. On behalf of the claimant she submitted that she had sent the form to the Watford Employment address at Clarendon Road. That was the only address she said she had.

Conclusions

23. The Tribunal must determine firstly whether the complaint was received within the three month time period with the effective date of termination. All agreed that the claim should have been received by the 30 July 2017. It clearly was not as it is date stamped 2 August 2017 and the Central Office in Leicester has confirmed in its email to the Tribunal of 1 March 2018 that is when it was received at that office by post.
24. The Tribunal must therefore determine whether the claim was submitted in such further period as it considers reasonable, where the Tribunal is

satisfied it was not reasonably practicable for the complaint to be presented before the relevant period.

25. The respondent accepted in oral submissions that the claimant was not seeking to mislead. The Tribunal has come to the same conclusion. What the claimant said about the inability to submit the claim online on 26 July 2017 is correct as it accords with knowledge that is now public that the Employment Tribunal's online system was taken down following the Unison decision. It was down for the period 26-31 July 2017.
26. The Tribunal accepts that the claimant went out of work on Thursday 27 July 2017 and posted her claim by Royal Mail tracked delivery. In view of the documentation and information that has now been obtained from the Employment Tribunal Central Office, the Tribunal must conclude that it was sent to the Central Office in Leicester. That was in accordance with the Practice Direction that claims be submitted by post to that office. The office has confirmed that it received it.
27. Applying the decision in Consignia the claimant was entitled to assume that when she posted the claim that it would arrive in the normal course of post which would have been on Saturday 29 July 2017. It clearly did not arrive until 2 August 2017 or in any event was not date stamped until that date. Had it arrived on 29 July as could reasonably have been expected it would have been in time.
28. Consignia makes it clear that if the letter did not arrive at the time when it would be expected to arrive in the ordinary course of post, but is unexpectedly delayed the Tribunal may conclude it was not reasonably practicable for the complaint to have been presented within the prescribed period. That must therefore be the Tribunal's conclusion on the facts of this case.
29. Did the claimant submit the claim within a reasonable period thereafter? It was in effect only received 3 days late. Considering the difficulties that were being experienced in the Employment Tribunal Service by both the administration staff and claimants by the result of the Unison decision and the fact that claims could not be submitted online the Tribunal must conclude that the claim was submitted within a reasonable time thereafter.
30. The Tribunal therefore has jurisdiction to determine the complaint which will now proceed and will be listed for a 2 day hearing.

ORDERS

Made pursuant to the Employment Tribunal Rules 2013

1. **Statement of remedy/schedule of loss**

- 1.1 The claimant is ordered to provide to the respondent and to the Tribunal, so as to arrive on or before **10 July 2018** a properly itemised statement of the remedy sought (also called a schedule of loss).
- 1.2 The claimant is ordered to include information relevant to the receipt of any state benefits.

2. **Disclosure of documents**

- 2.1 The parties are ordered to give mutual disclosure of documents relevant to the issues identified above by list and copy documents so as to arrive on or before **7 August 2018**. This includes, from the claimant, documents relevant to all aspects of any remedy sought.
- 2.2 Documents relevant to remedy include evidence of all attempts to find alternative employment: for example a job centre record, all adverts applied to, all correspondence in writing or by e-mail with agencies or prospective employers, evidence of all attempts to set up in self-employment, all pay slips from work secured since the dismissal, the terms and conditions of any new employment.
- 2.3 This order is made on the standard civil procedure rules basis which requires the parties to disclose all documents relevant to the issues which are in their possession, custody or control, whether they assist the party who produces them, the other party or appear neutral.
- 2.4 The parties shall comply with the date for disclosure given above, but if despite their best attempts, further documents come to light (or are created) after that date, then those documents shall be disclosed as soon as practicable in accordance with the duty of continuing disclosure.

3. **Bundle of documents**

- 3.1 It is ordered that the respondent has primary responsibility for the creation of the single joint bundle of documents required for the hearing.

- 3.2 The respondent is ordered to provide to the claimant a full, indexed, page numbered bundle to arrive on or before **10 September 2018**.
 - 3.3 The respondent is ordered to bring sufficient copies (at least five/three) to the tribunal for use at the hearing, by 9.30am on the morning of the hearing.
4. **Witness statements**
- 4.1 It is ordered that oral evidence in chief will be given by reference to typed witness statements from parties and witnesses.
 - 4.2 The witness statements must be full, but not repetitive. They must set out all the facts about which a witness intends to tell the Tribunal, relevant to the issues as identified above. They must not include generalisations, argument, hypothesis or irrelevant material.
 - 4.3 The facts must be set out in numbered paragraphs on numbered pages, in chronological order.
 - 4.4 If a witness intends to refer to a document, the page number in the bundle must be set out by the reference.
 - 4.5 It is ordered that witness statements are exchanged so as to arrive on or before **28 days before the full merits hearing**.
5. The matter will be listed for a 2 day hearing. The parties are to provide dates to avoid for the 3 months from the beginning of December within **14 days** of receipt of this summary.

CONSEQUENCES OF NON-COMPLIANCE

1. Failure to comply with an order for disclosure may result on summary conviction in a fine of up to £1,000 being imposed upon a person in default under s.7(4) of the Employment Tribunals Act 1996.
2. The tribunal may also make a further order (an “unless order”) providing that unless it is complied with, the claim or, as the case may be, the response shall be struck out on the date of non-compliance without further consideration of the proceedings or the need to give notice or hold a preliminary hearing or a hearing.

3. An order may be varied or revoked upon application by a person affected by the order or by a judge on his/her own initiative.

Employment Judge Laidler

Date: 12 June 2018.....

Sent to the parties on: .14 June 2018.....

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For the Tribunal Office