EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100051/2018

Preliminary Hearing Held at Glasgow on 29 May 2018

Employment Judge: Ms M Robison

Mrs G Smith	**Claimant** **in person**
Glasgow City Council	**Respondent** **Represented by** **Ms McFarlane** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the claim for unfair dismissal has been lodged out of time, and not being satisfied that it was not reasonably practicable to have lodged the claim in time, has no jurisdiction to hear the claim, which is dismissed.

REASONS

1. This preliminary hearing was set down to determine the question of jurisdiction. In particular, the respondent had sought to argue that the claim lodged by the claimant was a "nullity" because it was in a form which "could not reasonably be responded to"; and also that the claim was time-barred.

2. Mrs Smith explained that she had sent further particulars of her claim by e-mail dated 21 February 2018, having wrongly understood that they had been attached to the ET1. In the circumstances (and in light of the recent judgment of the Court of Appeal, **Secretary of State for BEIS v Parry and another 2018 EWCA Civ 672**), Ms McFarlane stated that she was no longer insisting on her "nullity" argument. She did point out that this information had not yet been added by amendment, and I explained to Mrs Smith that, depending on the outcome of this hearing, she should make a formal application to amend her ET1 to include that further information.

3. Thus the sole focus at this preliminary hearing was on the question of time bar.

4. Both the claimant and the respondent lodged a list of documents and a list of authorities upon which they intended to rely. The claimant had written out her submissions which she handed up. It became clear however, following discussion with Mrs Smith and Ms McFarlane, that the facts in this case are not in dispute. In these circumstances, there was no requirement to hear evidence from Mrs Smith. The case was dealt with on the basis of legal submissions alone.

5. Given that Mrs Smith is not legally qualified (although she has a law degree), and given the potential outcome may mean that Mrs Smith could not pursue her claim at all, I reserved my decision at the end of the hearing to allow me to give further consideration to the relevant case law.

Findings in fact

6. It was agreed at the hearing that the following facts are not in dispute, and therefore are agreed:

7. The claimant commenced employment with the respondent over 20 years ago and resigned on 10 August 2017 from her role as Principal Teacher of Pastoral Care at Holyrood Secondary School.

8. On 8 November 2017 the claimant notified ACAS through the early conciliation procedure of her intention to pursue a claim against the respondent. On 6 December 2017 an EC certificate was issued.

9. The claimant submitted a claim on-line to the ET portal for unfair constructive dismissal on Sunday 7 January 2018. The ET1 form was stamped as received on that date.

10. The claimant had undertaken research and was aware of the three month time limit for lodging the claim. She was aware that with early conciliation she had one further month to lodge her claim from the date that the certificate was issued, that is by Saturday 6 January 2017.

11. The claimant understood from her research that when the time limit fell on a non-working day such as a Saturday, that she had until the next working day to lodge the claim.

12. She waited until Sunday 7 January 2018 in the belief that her claim was in time if she lodged it on that date. She could have lodged it earlier. There was no other reason for her not to, except that she firmly believed that if she lodged it on 7 January 2018 that it would be lodged in time.

Submissions for the claimant

13. The claimant explained in submissions that around the time she received the EC certificate on 6 December 2017, she undertook research and noted that she required to file the ET1 within 1 month of the EC certificate and that if the deadline fell on a week-end, then the time limit was deemed to be the next working day. This was on the basis of her reading of the rules.

14. She relied in particular on rule 4(2) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, which states that “If the time specified by these rules, a practice direction or an order for doing any act ends on a day other than a working day, the act is done in time if it is done on the next working day. “Working day” means any day except a Saturday or Sunday, Christmas Day, Good Friday or a bank holiday under section 1 of the Banking and Financial Dealings Act 1971.

15. She submitted therefore that the claim had been submitted in time and by reference to ERA s207B(4), regard should be had to rule 4(2) so that submitting the claim before the next working day, Monday 8 January, would bring the claim in time. She came to this understanding as a result of reading the rules and researching around them.

16. Mrs Smith submitted that her claim was lodged in time, and that if not, then the time for lodging her claim should be extended under section111(2)(b) ERA, on the ground that it was not reasonably practicable for her to have lodged it within the time frame.

17. She explained that she had obtained an LLB from Strathclyde University in 2016, and so she has some legal knowledge, but she did not study the employment law module and she has never qualified as a solicitor. She submitted that it was not reasonably practicable for her to submit her claim in time as a result of her reasonable ignorance of the law, and in particular her lack of knowledge that rule 4(2) did not extend time to Monday 8 January 2018.

18. Further, thereafter there was no unreasonable delay, since the time in question is one day and the claimant filed her claim within the period she understood was applicable.

19. In support of her submission she relied on the case of **Marks and Spencer v Ryan [2005] EWCA Civ 470**, and while in that case the claimant was misinformed, here she had misinformed herself.

20. When she submitted the ET1 there was no indication from the ET that the claim might be time barred, and for that reason, and because she was so clear in her own mind that she had submitted it on time, she was surprised to receive the letter from the Tribunal stating that there would be a hearing on time-bar.

21. While she has been honest in advising that she has a law degree, she is a lay person and has found the events leading up to the termination of her employment and subsequently very stressful.

Submissions for the respondent

22. Ms McFarlane submitted that Mrs Smith could not rely on rule 4(2) because that rule does not apply to extend the statutory limitation period; rather it relates only to time specified by the rules, a practice direction or an order of the Tribunal. Time limits relating to the commencement of the procedure do not originate in the rule or a practice direction or an order, but in statute.

23. In support of that submission, she relied on the relevant sections of Harvey. Practice and Procedure, Time Limits for Presentation of Claims and in particular the section headed “expiry of time on a working day”. Reference is made there to the **Pritam Kaur v S Russell and Sons Ltd 1973 1 QB 336**, and she relied on the dicta of Lord Denning.

24. Although she had not given consideration to the interplay with rule 90, she is of the view that the case of **Consignia plc v Sealy [2002] IRLR 624** mentioned there is relevant, because it was possible for the claimant to submit her claim on the correct date, by doing so on-line.

25. With regard to the claimant’s argument that it was not reasonably practicable to lodge the claim on line, she relied on the case of **Walls Meat Company Ltd v Khan**, at paragraph 15. Here the claimant knew when the time limit was. However, she read rule 4(2) incorrectly, and has given no reason other than that why she did not get her claim in on time.

26. The claimant has a law degree and was able to undertake legal research. She knew to contact ACAS regarding early conciliation. She could not be said to be reasonably ignorant because she knew that the last day was 6 January, but she mistakenly thought that was extended. She has given no reason why she left it to the last minute in that way; she had the EC certificate since 6 December then she did not lodge the claim for a month. She had been discussing making a claim some months before, and in particular she referred to unfair constructive dismissal in a letter to Mrs McKenna. That was not a reason to bring it within the test of not reasonably practicable. The claim is lodged out of time and should be dismissed.

The relevant law

27. The law relating to time limits in respect of unfair dismissal is contained in the Employment Rights Act 1996. Section s111(2) states that an employment tribunal shall not consider a complaint unless it is presented before the end of the period of three months beginning with the effective date of termination or 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.

28. Where the claim is lodged out of time, the tribunal must consider whether it was not reasonably practicable for the claimant to present her claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present his claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

29. The Court of Appeal in the case of **Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119** considered the meaning of the phrase "not reasonably practicable". In that case Lord Justice May said that "we 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.... the words...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."

Tribunal decision

30. I accepted Ms McFarlane's submission that the provisions of rule 4(2) relate to the rules of procedure, practice directions and tribunal orders. The issue in this case relates however to a statutory limitation period, ie three months.

31. The first question then is what is the position when a statutory time limit expires on a non-working day, as it did here, on a Saturday.

32. Ms McFarlane quoted Lord Denning in **Pristan Kaur**, which deals with time limits generally. That is a case however from 1973 when there was a requirement to have claims physically delivered and acknowledged at court. The situation has changed in no small way because here we are dealing with the Employment Tribunal in 2018, and the facilities which are available

through the internet; in any event that case refers to situations where it is necessary to lodge documents at court.

33. The Court of Appeal has ruled on the principle more recently, in the **Consigna** case, in the employment tribunal context, and held that if the last day of the period is a day when the tribunal offices are closed, time will expire on that day and will not be treated as extended until the next day when they are open even where they are no physical means of presenting the document while they are closed. There requirement is to show that it was impossible to present a complaint before the time limit.

34. Thus it depends on the nature of the act of presentation; nowadays documents can be presented without the offices being open. The question is whether it was possible for the document to be presented in the time limit

35. Here, the claimant actually submitted her claim through the on-line portal on a Sunday, ie a non-working day. The document was accepted as having been submitted on that day and indeed it was stamped as received by staff (presumably in fact on the Monday when the office was open). The claimant has thereby proved the very thing that she would need to assert could not happen in order for her claim to have been accepted as lodged in time.

36. Indeed this principle has found its way into the rules, specifically rule 90 states that when it comes to delivery of documents (such as claim forms) to the Tribunal in accordance with rule 85, the date of delivery will depend on the method of the delivery of the document. Specifically, documents sent by electronic means, will be deemed delivered on the day of transmission.

37. That provision does allow for the contrary is proved, so that in a case of electronic submission, it may be that the on-line portal is down for example, or that an there was an attempt to upload on the Saturday but due to technical failure it had not been received until the Sunday this may be sufficient.

38. There was however no such issue in this case and I thus concluded that the claim had been lodged out of time, albeit only one day late.

39. Mrs Smith argued that it was not reasonably practicable for her to have lodged the claim, relying on her “reasonable ignorance”. She relied on the **Marks and Spencer** case, although recognised that the circumstances there were different, in that it was accepted by the tribunal in that case that the

claimant was not aware that she needed to present a complaint before the expiry of the three month time limit.

40. Ms McFarlane relied on the **Walls Meat Company** case, specifically the dicta of the Master of the Rolls at paragraph 15, that the approach 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 advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have so expected, it was his or their fault, and he must take the consequences". This is a decision from 1978, and despite much subsequent case law on this issue, that principle remains a valid one.

41. The difficulty for Mrs Smith was that it could not be said that she was ignorant of her rights. She was very candid in her explanation that she knew that she could lodge a claim of unfair constructive dismissal and referred to that possibility in the letter to Mrs McKenna dated 5 September 2017 (C5). Nor could it be said that she was ignorant of the time limits. She was aware of the three month time limit; she was aware of the need to contact ACAS; she was aware that she had one month from the date of the EC certificate to lodge the claim.

42. Mrs Smith said that she had conducted her own research and was sure she was right. She made no mention of having sought advice from a solicitor, or union or even a CAB. Clearly she could have sought advice from others who would have known or found out the relevant rules and case law and not stopped at rule 4(2) and gone no further.

43. Unfortunately being candid and indeed making an honest mistake is not sufficient when the law relating to the circumstance described is clear. Harsh though it may appear, the time limit rules are strict, going to the question whether the Tribunal can hear a claim at all. There is no lee-way or sliding scale (except when it comes to whether the claim was lodged a reasonable time after it became reasonably practicable to lodge it).

44. Despite the fact that the claim was lodged only one day late, still it was lodged out of time. The claimant could have, but did not, lodge the claim in time. It could not be said that it was not reasonably practicable for her to have

lodged the claim earlier. This means that the Tribunal does not have jurisdiction and I have no choice but to dismiss the claim.

Employment Judge: M Robison
Date of Judgment: 06 June 2018
Entered in register: 15 June 2018
and copied to parties