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EMPLOYMENT TRIBUNALS

Claimant: **Mr S Thomson**

Respondent: **Poundland Limited**

Heard at: **East London Hearing Centre** **On: Thursday 12 September 2019**

Before: **Employment Judge Jones**

Representation

Claimant: In person

Respondent: Miss Webber (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that the complaint of unfair dismissal was not presented in time despite it being reasonably practicable to do.

The claim is dismissed.

REASONS

1 The Claimant brought a complaint of unfair dismissal which the Respondent resisted. Today's hearing was for the Tribunal to consider whether the claim could proceed given that it was issued on 23 April 2019 and the Claimant's dismissal happened on 7 December 2018.

2 The Tribunal heard sworn evidence from the Claimant and from his partner, Ms Goodship. The Tribunal considered the following law in coming to its decision in this matter.

Law

3 Section 111 (1) of the Employment Rights Act 1996 states that a complaint may be presented to an Employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.

4 Section 111 (2) of the same Act states 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 complaints to be presented before the end of that period of three months.

5 Section 207B (2) of the same Act provides that where parties have entered into conciliation before the institution of proceedings, time limits would be extended in the following way

(a) Day A is the day in which the Claimant concerned complies with the requirement of section (1) of section 18A of the Employment Tribunal Act 1996 that is, the requirement to contact ACAS before starting proceedings, and

(b) Day B is the day in which the Claimant receives the ACAS certificate.

Subsection (3) states that in working out where 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.

6 Section 207B(4) states that 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.

7 In applying this to the facts of any case, the Tribunal was aware that there were two limbs to the test that it had to apply. Firstly, has the employee shown that it was not reasonably practicable for him to present his claim in time? The burden of proving this rests firmly on the Claimant. If he succeeds in doing so, the second part of the test is, whether the Tribunal is satisfied that the further time in which the claim was in fact presented was reasonable.

8 The question of what is or what is not reasonably practicable is a question of fact for the Tribunal to decide. And in the case of *Walls Meat Company Limited v Khan* 1979 ICR 52, Lord Denning stated as follows (repeating the test in which he had earlier set out in the *Dedman* case),

"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 advisers could not reasonably be expected to have been aware of them. If he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences".

9 What is meant by reasonably practicable? In the case of *Singh v Post Office* 1973 ICR 437, the court held that the word practicable could be seen as the equivalent as feasible and the question the tribunal had to ask itself was – whether it was reasonably feasible to present the complaint to the Tribunal within the relevant three-month period. The Tribunal must consider whether or not it was reasonably practicable or feasible against the background of the surrounding circumstances and the aim to be achieved. The Tribunal must consider this in relation to the whole period of time between the cause of action arising (i.e. the dismissal) and the issue of proceedings. The Tribunal has to look at not just whether there was a physical impediment but also all the factors in existence at the time.

10 In relation to the issue of the Claimant's expressed ignorance of his rights, in the *Dedman v British Building and Engineering Appliance Limited* 1974 ICR 53, Lord Justice Scarman stated that if the Claimant is saying that he did not know of his rights, the relevant questions for the Tribunal would be: what were his opportunities for finding out that he had rights? Did he take them? If not, why not? Was he misled or deceived? Should there prove to be an acceptable explanation of his continuing ignorance of the existence of his rights, it would be inappropriate to disregard it, relying on the maxim "ignorance of the law is no excuse". The word "practicable" is there to moderate the severity of the maxim and to require an examination of the circumstances of his ignorance". In the *Walls Meat Company Limited* case already referred to above, Lord Justice Brandon LJ said the following in relation to whether ignorance as opposed to mistaken belief, might give grounds for a finding of reasonable impracticability:

"With regard to ignorance operating as a similar impediment, I should have thought that, if in any particular case an employee was reasonably ignorant of either

a. His right to make a complaint of unfair dismissal at all, or

b. How to make it, or

c. That it was necessary for him to make it within a period of three months from the date of dismissal, an Employment Tribunal could and should be satisfied that it was not reasonably practicable for his complaint to be presented within the period concerned.

For this purpose, I do not see any difference, provided always that the ignorance in each case is reasonable, between ignorance of a) the existence of the right, or b) the proper way to exercise it or c) the proper time within which to exercise it. In particular, so far as c) the proper time within which to exercise the right, is concerned, I do not see how it could be just freely said to be reasonably

practicable for a person to comply with the time limit of which he is reasonably ignorant."

11 He went on to say that if a person knew of the existence of the right to bring proceedings, it may in many cases be difficult for him to satisfy a tribunal that he behaved reasonably in not making reasonable enquiries as to how, and within what period, he should exercise that right.

12 *Harvey* comments that while a Claimant's state of mind is to be taken into account, it is clear that his mere assertion of ignorance about the right to claim, or the time limit, or the procedure for making the claim, is not to be treated as conclusive. The tribunal must be satisfied as to the truth of the assertion and, if it is, it must be satisfied that the ignorance in each case was reasonable. At the other end of the scale is the case of *Marks & Spencer PLC v Williams-Ryan* 2005 IRLR 562 where the claimant was aware of the right to claim unfair dismissal. However, she was ignorant of the time limit relating to such a claim. The claimant in that case was able to prove that it was not reasonably practicable for her to have issued her claim in time because the employer's post-termination advice to her as to her rights, while referring to the right to make a claim to an employment tribunal, did not mention the time limit and was therefore misleading. The claimant in that case had also been advised by the Citizen's Advice Bureau that she should exhaust the employer's Internal Appeals procedure before she brought a claim to the employment tribunal. It that case it was held that it had not been reasonably practicable for her to have issued her claim in time and she was able to pursue her claim.

13 The Tribunal made the following findings and fact after considering the evidence.

Findings of Fact

14 The Claimant was employed from 4 November 2015. His last day of employment was 7 December 2018.

15 The Claimant's evidence was that he contacted ACAS on the day following his dismissal or soon after. It was his evidence that he and his partner, Ms Goodship did some research online to find out how to challenge his dismissal and bring a complaint to the Employment Tribunal. They found out that he needed to go through the ACAS conciliation process first before issuing a claim. Ms Goodship's evidence was that she was aware that there was a three-month time limit within which they had to issue proceedings in the Employment Tribunal. She did not recall asking ACAS or anyone else when time began to run. She was aware that the ACAS conciliation process '*stopped the clock'* in terms of counting the period of time but she was not clear as to how that applied.

16 The ACAS conciliation certificate confirms that the Claimant began the conciliation process on 15 January 2019. The process ended on 6 February 2019.

17 The Claimant decided to pursue his complaint in the Employment Tribunal and he completed an ET1 form online. The Claimant and his partner, Ms Goodship printed

the ET1 form out and posted it to what he thought was London Central Employment Tribunal. The Claimant did not keep a copy of the form he sent to that Employment Tribunal. The Tribunal finds it likely that the Claimant went to the post office and posted the form to the Tribunal by special delivery. He obtained a certificate of posting from the post office.

18 The Claimant had the original certificate of posting with him during today's hearing and a copy of it was in the bundle of documents put together by the Respondent for today's hearing. The certificate of posting had the number of the address to which the package had been sent to as 30-34. Since the London Central Employment Tribunal is at 30-34 Kingsway, it is likely that the envelope was addressed to 30-34 Kingsway. However, the post code recorded on the certificate of posting is EC2B 6EX. The postcode for the London Central Employment Tribunal is WC2B 6EX.

19 The Claimant never received an acknowledgement of receipt from the London Central Employment Tribunals. He never received a letter of rejection from the Employment Tribunals and the ET1 form was never returned to him because it could not be delivered or for any other reason. The Claimant's enquiries at the post office has produced a notification that someone called '*Claudia'* signed for the envelope. However, the notification does not confirm that the package was received by London Central Employment Tribunals. It does not say what entity '*Claudia'* worked for or in what capacity she accepted the package.

20 The Tribunal concludes that from the incorrect postcode and from the lack of acknowledgement or any correspondence from London Central Employment Tribunals to the Claimant, that it is highly unlikely that the Tribunal ever received the ET1 form from the Claimant. As it was sent to an incorrect postcode it is likely the envelope went astray or that the person called Claudia who signed for it was not from the Employment Tribunal but from some other entity at EC2B 6EX.

21 The Claimant and Ms Goodship tried to secure legal advice at the local Citizen's Advice Bureau but were unsuccessful. It is not clear when they tried to do this and whether this was before they issued the ET1 or afterwards.

22 Approximately 4 – 5 weeks after the ET1 complaint form was sent by special delivery to the incorrect address the Claimant realised that something was wrong as he had heard nothing from the Employment Tribunals. He contacted ACAS who confirmed to him that it was likely that the process would take some time and that he should be patient. It was likely that at approximately 6 weeks after posting the form, the Claimant and Ms Goodship telephoned the Employment Tribunal to find out what had happened with his ET1 form.

23 Ms Goodship confirmed that she spoke to someone at the Employment Tribunals at London Central as at the time, the Claimant believed that they had received his ET1 form. Ms Goodship's evidence was that they were told by someone at the Tribunal offices that ET1 forms sent by post are not accepted and that the Claimant will have to submit his claim online. If that is what the Claimant or Ms Goodship was told, that would have been incorrect information. The correct position is that claim forms are usually submitted online but that postal applications are acceptable and are

processed in the normal way. Every form received by the Tribunal is supposed to be processed and acknowledged by post and/or online, depending on the Claimant's preferences. Some Claimants prefer the Tribunal to communicate with them by email rather than by post. That was not applicable in the Claimant's case.

24 The certificate of posting confirms that the Claimant and Ms Goodship posted the claim form to the incorrect postcode on 15 February 2019. The Claimant estimated it was likely that they called the Employment Tribunal offices four weeks after the form had been sent in. Ms Goodship in her evidence believed that it was more likely to have been six weeks. Giving the Claimant the benefit of the doubt, if he telephoned the offices within six weeks of 15 February then it is likely that he was told sometime around 25 March that his claim had not been received or, as he recalled it, that it had not been properly submitted and that he needed to submit a new claim from electronically online to the Employment Tribunal.

25 Ms Goodship's evidence was that they completed a new ET1 form immediately upon being told that they had to submit another one. However, the new electronic version of the ET1 was not submitted to the Employment Tribunal until 23 April.

26 It was Ms Goodship's evidence that she believed that they had three months from the end date of the ACAS certificate in which to issue the claim. It was not her evidence that she was advised of this by ACAS or anyone else. That was incorrect. The period of three months begins to run from the date of dismissal. The application of the early conciliation process and the section 207A of the Employment Rights Act as set out above means that the clock is stopped during the period of conciliation and then starts again at the end date of that process.

27 The conciliation period in this case was 22 days.

28 Any claim form submitted to any of the Tribunals offices would have been acknowledged, even if it had been sent to the wrong office. The form will then be forwarded to the correct office for a file to be opened there. The Claimant received no communication whatsoever from any Employment Tribunal office following submission of his claim form on 15 February and it is therefore unlikely that the form was received anywhere. The only claim form the Employment Tribunals have ever received from the Claimant was the one issued on 23 April 2019.

Decision

29 Complaints for unfair dismissal need to be submitted to the Employment Tribunal within three months less one day of the date of dismissal. The clock is stopped for the duration of the conciliation period. In this case, that is a period of 22 days - between 15 January 2019 and 6 February 2019. The primary time limit expired on 6 March 2019. 22 days added to the primary time limit gives a new extended time limit of 28 March upon the application of subsection (3) of section 207B Employment Rights Act 1996. There is no additional extension as a result of section 207B(4) because the extended time limit under section 207B(3) of 28 March 2019 did not fall within the period beginning with Day A and ending one month after Day B as one month after Day B would be 6 March 2019.

30 It is this Tribunal's judgment that the Claimant's ET1 claim form was presented at the Employment Tribunal was issued on 23 April 2019 and was therefore presented out of time.

31 Was it reasonably practicable for the claim to have been issued within the time limit?

32 The circumstances of this case were follows: there was no physical impediment preventing the Claimant from issuing the claim in time. The Claimant was aware at the end of the meeting on 7 December 2018 that he had been dismissed. The Claimant had not been waiting for the outcome of his appeal against dismissal. The appeal was sent to him a few days after he submitted the first claim form on 15 February.

33 Although they contacted ACAS fairly soon after the Claimant's dismissal, there was no suggestion that ACAS wrongly advised the Claimant about the date for issuing proceedings. Ms Goodship knew of the three-month time limit from her online research. She did not seek to clarify with ACAS or anyone else, when time would start to run.

34 In this Tribunal's judgment, the attempt to submit a claim form on 15 February was a genuine one. In addition, it is unlikely that the Claimant was aware that he had submitted the claim to the wrong postcode when addressing the envelope. In my judgment, it is likely that the postcode to which the document was sent and which is recorded on the certificate of posting is the postcode that was written on the envelope. It is possible that the teller at the post office had made an error in transcribing the post code from envelope to the certificate but it is also equally possible the wrong post code was written on the envelope. It is this Tribunal's judgment that the envelope was wrongly addressed as the postcode that was put on it was incorrect. If it had been correctly addressed it would have arrived at London Central Employment Tribunal offices and the Claimant would have been sent an acknowledgment. He would have received correspondence from the Tribunal offices. He never received any correspondence from the office or any other Tribunal office. In those circumstances, it is this Tribunal's judgment that the error was not that of the post office teller but the Claimant in wrongly addressing the envelop. It is highly unlikely that the envelope ever arrived at London Central Employment Tribunals.

35 Sometime during March, the Claimant found out that the form had not been accepted at London Central Employment Tribunals or had never arrived. Whether it is the fact that it never arrived or that he had been told on the telephone that he needed to submit one online for it to be acceptable, he was clear sometime in March that he needed to submit another claim form online.

36 However, the ET1 claim form was not submitted until 23 April. It is this Tribunal's judgment that the Claimant delayed a further four weeks before submitting his ET1 claim form. It is likely that this happened because of the Claimant's belief that he had three months from the date of the ACAS certificate i.e. 6 February in which to submit a claim form. That was incorrect information and it was not clear to the Tribunal how Ms Goodship came to have that belief. She did not arrive at that belief from advice

from ACAS, the CAB, or the Tribunal office. The time limit is three months from the date of dismissal with the addition of the 22 days of conciliation period added. The new limitation date was 28 March. The claim form was submitted outside of the time limit.

37 The Claimant did not provide the Tribunal with an explanation for the delay in issuing the second ET1 until April. It is likely that the Claimant spoke to the Tribunal offices in March. Why was there a delay until 23 April before the online ET1 was issued? Because of that unexplained period, it is this Tribunals judgment that it was reasonably practicable for the Claimant to have issued his claim within the statutory time period extended by the ACAS conciliation process. There was nothing that prevented him from issuing his claim by the 28 March. There was sufficient time after he was told by the Tribunal offices that they had not received a claim from him or that the claim form that had been sent by post had not been accepted; if the Tribunal accepts his recollection of events.

38 The claim was issued weeks after the conversation he had with the Tribunal staff in which he was clear that he had to issue his claim form online. The claim was issued after the expiration of the extended time limit in circumstances where the Tribunal judge that it was reasonably practicable for him to have issued it in time.

39 It is this Tribunal's judgment that the claim was issued out of time.

40 It is this Tribunal's that it was reasonably practicable for the Claimant to have issued his claim in time. The Tribunal does not extend time. The Tribunal therefore has no jurisdiction to hear the Claimant's complaint of unfair dismissal.

41 The claim is dismissed.

Employment Judge Jones

30 September 2019