



EMPLOYMENT TRIBUNALS

Claimant

Respondent

Mr Michael Rolfe

v

POA

Heard at: Watford

On: 17 December 2018

Before: Employment Judge Henry

Appearances

For the Claimant: In person

For the Respondent: Mr S Brittenden - Counsel

PRELIMINARY HEARING JUDGMENT

1. The claimant's claim has been presented to the tribunal outside of the requisite time period.
2. The claimant has not presented his claim within a reasonable time thereafter.
3. The Tribunal does not have jurisdiction to entertain the claimant's claim.

REASONS

1. The matter comes before the Tribunal on the preliminary question whether the claimant, pursuant to Section 111 of the Employment Rights Act, has presented his claim to the tribunal within the period of 3 months beginning with the effective date of termination, and if not, whether it was reasonably practicable so to do, and if not, whether the claim has been presented within a reasonable time thereafter.

The Law

2. The law relevant to the issue for the Tribunal's determination has been succinctly set out by submissions of the respondent at paragraph 10 to 14 and paragraph 24 to 26 which I do not seek to re-state, but adopt as if more particularly here set out.

Submissions

3. The respondent presented written submissions which were augmented by an oral presentation. The claimant presented oral submissions. The submissions have been fully considered.

Evidence

4. The Tribunal received evidence from the claimant who, not having a written statement, presented oral evidence in chief upon which he was then cross-examined. The Tribunal had before it bundles of documents, exhibits R1 and C1
5. From the evidence heard, and the documents seen, the tribunal finds the following material facts.

Facts

6. The claimant was an elected member of the Prison Officers Association (POA), a trade union for prison and correctional and secure psychiatric workers. He had been a branch representative between 2009 and 2011, a branch secretary from 2011 to 2013, and the national chair from 2013 to 2017,
7. By correspondence of the 3 May 2017, the claimant wrote to the POA, advising

“My candidacy for the Labour Party at the forthcoming election requires me to resign from the Civil Service. That resignation will be submitted to HMPPS today with immediate effect due to the strict guidance on impartiality which Civil Servants are expected to abide by during the election period.

I recognise that in doing so I will no longer meet the requirements of 4.1(a) of our Rules and Constitution and therefore 10.8 will apply. I also recognise that by associating myself so prominently with the Labour Party that this is not in keeping with the POA’s politically neutral position and that many members have different views from that of my own.

This decision has not been an easy one and it is with an extremely heavy heart and deep regret that I have chosen to pursue this direction at this time. I recognise that many people will be disappointed with this decision and that timing couldn’t have been worse with conference around the corner. I hoped that I could stay in position to ensure that any departure would see us past our annual conference.

I do feel that I owe all of our members an explanation and believe I should give this explanation if the executive will allow me at this years’ conference.

I know the work of the POA will continue, that there are many good and capable people at NEC and local level which will only serve to make the POA stronger. I hope that I have served the NEC well for the last 4 years and that after the shock, disappointment and anger that people will remember the good work that I did and that the POA is in a stronger more united position than before.

I have chosen this course as I see it as the only viable option to try and get for our members that what they rightly deserve. I will make every effort to get elected into parliament and if successful I will then pursue every possible role and position to hold the power and use it to fight social injustice for our members and beyond.

Finally, I would like to thank the NEC, FTOs, local reps, POA staff and also our members for all the support that they have shown me over the last 4 years. Without that support I do not believe the POA would be in such a strong position.

Yours faithfully”

8. By reply of the same day, the General Secretary on behalf of the NEC, wrote to the claimant under the heading “resignation as national chair”.

“Thank you for your email of 3 May which was fully considered by the executive of the special NEC today, this email was reluctantly accepted by the NEC as your formal resignation letter from the position of national chair.”

9. In respect of the claimant’s request to speak to delegates, this was subsequently agreed, and the claimant duly addressed the membership.
10. On the claimant unsuccessful in his bid for election to parliament, an issue arose as to the claimant’s membership with the POA, for which he presented a complaint to the certification officer, pursuant to Section 108a(1) of the Trade Union and Labour Relations (Consolidation) Act 1992, the particulars of which are not material to the issues for this Tribunal’s determination, otherwise than to note the sequence of events, albeit it is here noted that the claimant’s evidence is that in presenting his complaint, he had researched matters to ensure that he was presenting his complaint to the correct body.
11. In November 2017, following the claimant making a subject access request, he was furnished with documents totalling some 16,000 pages, which he then trawled through between receipt in November 2017 and February 2018, becoming aware of the employment claim and judgment, in the case of POA v Gough and Cox UKEAT/0405/09, judgment handed down on the 17 December 2009, the relevance of which being that, that judgment determined that NEC members, being national chairs were employees.
12. From this judgment, the claimant states that he then became aware that he may be an employee. The claimant has stated that having read the judgment, he was not then clear as to employee status, however he did not seek advice thereon, and indeed, it is the claimant’s evidence that he did not

carry out any investigations as to employee status at this time, or otherwise seek legal advice until September 2018, when he sought advice in respect of an appeal by the respondent against the certification officer's findings.

13. It is the claimant's evidence that, it was not until he received the certification officer's judgment, a copy of which is at R1 page 29, which on reference being made therein as to employment, it then crystallised for him that he was perhaps an employee and that being aware of ACAS early conciliation, having made enquiries thereof on-line, submitted his application for early conciliation on the 5 April 2018, for which a certificate was issued on the 9 April 2018.
14. On receiving the certificate, the claimant states that the certificate being issued quickly, he had expected something further and therefore waited to receive further contact which, on this not forthcoming, and being conscious of the time limit within which to present a claim to the tribunal, which the claimant states he had been aware of for a number of years, and that the time period commenced from the effective date of termination of employment, using the date when he became aware that he potentially had been an employee of POA by the Gough and Cox decision, he presented his complaints to the tribunal on the 24 May 2018, being within 3 months from the date he learned of the judgment. In respect hereof, the claimant again states that he did not make enquiries or carry out further investigation as to employment status or presenting a claim to the tribunal, or otherwise seek advice.
15. It is however, the claimant's evidence that, he had made enquiries of the POA for assistance, but was refused, and equally being a member of the union NAPO, on their retained solicitors being Thompsons, the same solicitors who act for the POA, he did not think he would get advice therefrom. The Tribunal has not been presented with any correspondence in respect thereof, which is here recorded for completeness.
16. It is the claimant's position that at all material times, whilst he was an executive of the POA, he had been informed that NEC executives were not employees, a matter constantly being re-enforced by his dealings with the POA and as national chair, (the highest position within the union) and which it is worthy here to note that, this is the POA's official position in respect of employment of NEC officials, as recorded in the June newsletter of the POA, "Gatelodge" that:

"There have been 16 elected national chair members since the foundation of the POA in 1939 and countless NEC members. All of these have been lay members and proud of that fact. The POA is often hailed by other trade unions as being truly democratic. Those who wish to criticise us for being too democratic invariably are those who wish to attack and demonise the union. Those who wish to claim employment status whilst serving as lay members are only interested in self-profit, self-promotion and drawing monies from the membership. We must stick to our values."

17. This is a position which the claimant does not formally derogate from, save that, by presenting his complaint to the tribunal, by implication, he does. In respect hereof, the Tribunal was referred to the certification officer's judgment making reference to employment status, which records at paragraphs 31 to 35, that

"31. Both Mr Rolfe and the union appear to agree that, following Prison Officers Association and Others v (1) Gough (2) Cox [2009] EAT, NEC members can be considered to be employees of the union. That means that NEC members are entitled to be members of the union under Rule 4.1(b). Other members of the NEC, including the general secretary Mr Gillan, fall within that Rule and consequently remain members of the union even though they are not employed elsewhere under Rule 4.1.

32. Mr Rolfe told me that he did not want to rely on Rule 4.1(b) to remain as a member because a conference motion some time ago supported the view that lay member officials should not be full members of the union without also holding a post qualifying elsewhere under Rule 4.1. This motion was following the EAT case. Additionally, he knew that many union members shared the view that lay officers should not qualify for full membership.

34. Consequently, I agree with both parties that until 3 May 2017, Mr Rolfe was an employee of the union, whether or not he believed it was appropriate or a status he wished to rely on."

Conclusions

18. There are a number of facts which I highlight, which are germane to the findings. The first is that the claimant, was the branch representative from 2009 to 2011, a branch secretary from 2011 to 2013 and then the national chair from 2013 to 2017, and in respect thereof, I refer to the case of POA v Gough and Cox, the judgment delivered in September 2009, a time when the claimant was an active union representative, where it identifies that both Mr Gough and Mr Cox were employees and the document upon which the claimant states it then crystallised for him that he perhaps was an employee. In looking at this judgment, I am conscious of the gatelodge publication of June 2009, that:

"...The POA is often held by other trade unions as being truly democratic those who wish to criticise us before being too democratic inevitably are those who wish to attack and demonise the union. Those who wish to claim employment status whilst serving as lay members are only interested in self-profit, self-promotion and drawing monies from the membership. We must stick to our values."

and I am of the view that this position would have been known by the claimant at the relevant time of the Gough and Cox Judgment being handed down, and was a moral position of the union which, I find the claimant had

signed up to, and was fully in accord with, as has been identified in the certification officer's judgment at paragraph 32 and 34 to 37, that being that, the claimant made a decision as to the position he took in respect of employee status.

19. Having made reference hereto, to set the context in which the case is set, I do not propose to make a determination hereon as to how that features in respect of Section 111 ERA, otherwise then to note that at that time in 2009, the claimant would have been aware that there was an issue arising as to employment status of a chair of the NEC. I do not make any determination as to whether it would, as a consequence have been practicable for the claimant to have presented his complaints to the Tribunal on his employment or the relationship with the respondent coming to an end as of 3 May 2017, where he has presented his complaints to the Tribunal on 24 May 2018, there being no argued or discernible impediment.
20. Whilst there is evidence to support the respondent's contention that the claimant was, at the time his relationship with the POA came to an end, aware of the issues regarding employment status and was then on notice and ought to have taken steps to clarify the position, I do not seek to make that determination, although I accept that the correct order in addressing matters for the tribunals determination would be for me to address that issue first.
21. For the purposes of this case however, I think the preliminary issue arising can be satisfactorily addressed, by looking at whether or not, it was reasonably practicable for the claimant to have presented his complaint to the Tribunal within the period of 3 months from, as the claimant puts it, a point when he became aware that he had a right to make a claim before the Tribunal.
22. The claimant states that he got the Gough and Cox decision, in February 2018. The claimant was aware of the Employment Tribunals, and of the right to claim unfair dismissal. The claimant was further aware of the 3 month time limit from the effective date of termination within which to present a Tribunal claim. The relationship with the respondent, whatever it may have been, or seemed to be, ended on the 3 May 2017.
23. In respect hereof, the claimant states that having received the Gough and Cox judgment, he was not clear as to exactly what it was saying in respect to employment status. From a perusal of the judgment, the position is very clear as to employment status of the therein referred chairman. That as may be, the claimant states, as a lay person not versed in the law, he did not fully understand the judgment. In this respect, I note that the claimant then did not take any steps to clarify what that judgment meant, this in circumstances where it would have been reasonable, were there uncertainty, to try to clarify the position.
24. With regards to the claimant's further argument that, it was not then until the determination of the certification officer, on the 19 March 2018, that he

understood and accepted his position in respect of employment status, on the certification officer making reference to employee status. When one reads that judgment, it is clear that the certification officer there makes reference to the knowledge of employment status and of the claimant making a conscious decision not to accept that position, and presents argument thereon. The Tribunal notes the claimant's submission in respect hereof that, he states that the certification officer's finding was that the respondent, POA, had not done sufficient to bring to his attention the alternative to the claimant's argument, one of which was his employment status. That as maybe, the point of relevance here is that, the claimant at that stage was aware that employment status was something to which he ostensibly had, and by which the claimant says, he became aware that he then had a potential claim.

25. On the claimant receiving the certification officer's judgment, circa the 19 March 2018, the claimant then does not take action for a number of weeks until the 3 April, when he then contacts ACAS. The claimant has not explained why exactly, there was this delay. Despite this, the claimant's case is that, he had researched what was required and learnt that he had to make contact through ACAS before presenting a claim to the tribunal, which he then did. Having contacted ACAS for early conciliation, a certificate was issued on the 9 April 2018. By the certificate issued, it there identifies that the claimant having gone through early conciliation, and a resolve not found, he then had the right to present his complaint to the Employment Tribunal. The claimant then does not take action to present his complaint to the Tribunal until the 24 May 2018. It is the claimant's submission here that, he had waited for some action, or had expected further action in respect of ACAS' approach, be it from ACAS or otherwise through the POA, which upon not receiving any further contact, conscious of the 3 month time limit, he then took action to present his claim.
26. In looking at what the claimant understood as regards the 3 month period within which he had to present his claim to the tribunal, the claimant states that the 3 months begun once he became aware of his employment position. In looking at the law, there is no reference to knowledge, the reference is as to the "effective date of termination", which the claimant states he was aware of. This the Tribunal finds remains a constant, and the claimant was fully aware at all material times that his relationship with the respondent had come to an end in May 2017, and therefore any consideration of time would have to have commenced from then, the tribunal does not find that the claimant had a genuine belief in the proposition he now advances.
27. On the claimant becoming aware conclusively, circa 19 March 2018, and having waited until the 24 May, as he states, were that the case, and the claimant was not clear as to what he was expected to do, I find that the claimant had no just cause or impediment not to take steps to obtain legal advice or other advice to assist him in understanding the Judgment, and in presenting his claim to the tribunal, and indeed, the claimant's evidence is that he did not seek legal representation or legal advice until September 2018, this being in respect of the respondent's appeal against the

certification officer's findings and indeed, it is further the claimant's claim that, in respect of research, whilst he undertook it in respect of the procedure before he presented his claim to the certification officer, he had done so solely in respect of the treatment of him by the POA in removing him from the union, not in respect of any question as to employment, which he could have done, which this tribunal finds to have been reckless by the claimant, where he believed he had a cause of complaint to the tribunal.

28. At no stage has the claimant identified that he took steps to consider his position regarding employment, or to determine what steps he needed to take in respect of any employment claim he may have had against the POA;
29. The claimant at all times has relied on his personal knowledge of employment law which, the Tribunal accepts the claimant would have had a fair understanding of, from his service as a union official over the years. What is however material, is the fact that the claimant had sufficient knowledge of employment law and the employment process, that would have put him on notice to have made enquiries at any stage where he was not clear. The claimant has not done that, and I find that in those circumstances, were one to accept (not having made a determination thereon) that it would not have been practicable for the claimant to have presented his complaint within the period of 3 months from the effective date of termination, and that the claimant was then only aware of his right to present a complaint for unfair dismissal to the Tribunal on his receiving the judgment of POA v Gough and Cox, which is a clear judgment identifying employment status, or otherwise on the certification officer's judgment, I find that the claimant would have been on notice from that point, and it would have been incumbent on him to take action to clarify and/or seek to prosecute his employment rights.
30. There is nothing presented by the claimant that would cause me to believe that the claimant did not understand that the clock was running from the effective date of termination and that the termination in question was the ending of his relationship with the POA as national chair on 3 May 2017, and that it was incumbent on him to move swiftly. The claimant has failed to do so, and in these circumstances, I find that were the position that the claimant could not have presented his complaint to the Tribunal in the requisite time period of 3 months from the effective date of termination, he has not then presented his complaint to the Tribunal within a reasonable time thereafter; the position as to employment status being clarified beyond doubt for the claimant, the latest time being circa 19 March 2018, and on which he failed to reasonably act.
31. The Tribunal accordingly finds that the Tribunal does not have jurisdiction to entertain the claimant's claim, the claim being presented outside of the requisite time period and the claimant has not presented his claim within a reasonable time thereafter.

Employment Judge Henry

Date:18.02.19.....

Sent to the parties on: ...26.02.19.....

.....
For the Tribunal Office