

The 'unlawful' fees regime does not always mean that out of time claims will be accepted

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Mr G Wray v Jewish Care (UKEAT/0193/18/JOJ)

(Judgment handed down on 17th April 2019)

The Facts

1. Mr. Wray was employed by the Respondent as a chef and was dismissed for alleged gross misconduct on 6th March 2017. Mr. Wray commenced ACAS EC on 24th April 2017 and the certificate from ACAS was issued on 7th June 2017. Mr. Wray contacted the CAB around 10th June 2017 but was not given an appointment until 13th July 2017. Mr. Wray lodged claims for unfair dismissal and breach of contract on 6th September 2017. Those claims were evidently prima facie out of time, the time for presenting those claims expiring on 18th July 2017.
2. Mr. Wray was advised by his legal advisor on 13th July 2017 that the time for limitation had expired on 6th July 2017. Whilst the ET proceeded initially on the same assumption, following an application for reconsideration in light of the EAT judgment in **Luton Borough Council v Mr M Haque (UKEATPA/0260/17/JOJ)** it was accepted that limitation in fact expired on 18th and not the 6th July 2017.
3. Mr. Wray did not attend the preliminary hearing but he was legally represented and provided a written statement for that hearing. Mr. Wray put forward in his statement a number of reasons for the delay in presenting his claims, which can be summarised as follows:
 - a. Lack of knowledge of time limits;
 - b. Delays due to ACAS and time to get appointment with CAB;

- c. 'lack of funds' - He was saving up to fund the case and pay the £250 tribunal fee plus his lawyers' fees and it was only in early August 2017 that he learnt that the tribunal fees had been abolished.

ET's Decision

4. The EJ considered the material she had before her and held that the Claimant had not made out that it was not reasonably practicable to bring his claim in time because there was information reasonably available to him and because the EJ was not satisfied that Mr. Wray did not have the money to present a claim in time. In respect of the 'lack of funds' argument the EJ stated:

“The difficulty for the claimant with relying on lack of money and the applicability of the fees regime during the period from the end of the conciliation period until the expiry of the limitation period, is that I do not have the evidence before me to satisfy me that the claimant did not have funds even to present a claim. Indeed, his evidence is that he had been saving up to fund the case and pay tribunal fees and lawyer's fees. On the basis that this is the only evidence before me I cannot say that it was not reasonably practicable for the claimant to present his complaint within the applicable time limits for this reason either”

5. The EJ further held, in any event, that a delay of 2 months after the expiry of the extended limitation period was not reasonable.

Grounds of Appeal to EAT

6. Mr. Wray appealed to the EAT on various grounds. Pertinently it was submitted that the existence of fees for starting and pursuing ET proceedings detrimentally affected Mr. Wray's ability to proceed with his claim. Reference was made to **Unison** and it was submitted that the EJ erred in law by focusing on the impact the fee regime had on Mr. Wray rather than on its general impact on access to justice. It was further advanced (in the alternative) on Mr. Wray's behalf that it was 'self-evident' from paragraph 21 of his written statement that a core reason for him delaying issuing a claim was because he was saving up to pay the ET issuing fee of £250 and that he did not have the required fee at the time the claim should have been issued. Counsel for the Respondent submitted that the EJ did not err in finding there was no evidence before her that Mr.

Wray did not have funds to present a claim and that the evidence in his statement was that he was saving up to pay for items in addition to the issue fee of £250.

EAT Decision

7. The EAT held that the EJ did not err in law or reach a perverse decision and dismissed the appeal. In respect of the argument that ‘the mere existence’ of the unconstitutional and unlawful fees regime made it not reasonably practicable for the Claimant to issue his claim in time was not accepted. The EAT affirmed that:

“A claimant must establish why he did not present his complaint in time. A potential claimant may not present a claim in time for a variety of reasons. The existence of the fees regime may have been entirely irrelevant to such decisions. Adopting the argument advanced on behalf of the Claimant would result in it not being reasonably practicable for a millionaire to present a claim in time if the limitation period had expired while the fees regime was in place.” (Per Para 44)

8. In respect of the alternative argument that Mr. Wray had adduced evidence that he was unable to pay the £250 issue fee which thus rendered it not reasonably practicable for him to have presented his claim in time, the EAT likewise upheld the EJ’s judgment. Mr. Wray accepted before the EAT that he had not produced any evidence of his means to the EJ and his statement clearly made reference to saving up not just for the tribunal issue fee but also to fund the case and for lawyer’s fees. Thus, the EJ’s finding (in all the circumstances) that she did not have the evidence before her to satisfy her that Mr. Wray did not have funds to even present a claim could not be criticised.

Comment

9. This case highlights that a claimant cannot simply rely on the fact that limitation expired at a time when the (now unlawful) tribunal fees were in place so as to circumvent the usual principles to be applied in terms of seeking an extension of time. Each case will be looked at on its own facts and how the previous fees regime actually impacted upon a particular claimant’s ability to present his or her claim in time. This case further serves as a useful reminder of the importance of having clear evidence from the claimant themselves as well as adducing documentary evidence to corroborate their position as

far as possible as to why they were unable to present their claim in time because of the fees regime or otherwise.



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