



GRAY'S INN SQUARE

The nuts and bolts of Employment Law during COVID-19: Extension of Time Limits

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Outline

- Time limits
- ACAS Early Conciliation
- Applications for extensions of time
- Impact of COVID-19

Time Limits - Unfair Dismissal Claims

➤ Unfair Dismissal – s111(2) Employment Rights Act 1996:

...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.”

➤ Effective Date of Termination

Time Limits - Discrimination Claims

➤ s123(1) Equality Act 2010:

Subject to proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.

➤ s123(3) and s123(4) Equality Act 2010:

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

ACAS Early Conciliation & Time Limits

- s207B Employment Rights Act 1996 - Extension of time limits to facilitate conciliation before institution of proceedings:

(2) In this section—

(a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3) In working out when 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.

(4) 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.”

- *Luton Borough Council v Haque UKEAT/0180/17/JOJ*

Applications for Extension of Time: Unfair Dismissal Claims



➤ s111(2) Employment Rights Act 1996:

(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.

➤ Claimant has to satisfy two limbs:

- It was not reasonably practicable to bring the claim in time; and
- The claim has been presented in such further period as the Tribunal considers reasonable

'Reasonably practicable' – *Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490



- The test should be interpreted liberally in favour of the employee
- It is not only a test of physical impracticability
- If applicant is relying on ignorance, such ignorance must be reasonable
- The unreasonable ignorance or mistake of the skilled adviser is attributed to the claimant
- The test is one of fact, not law

‘Such further period that the Tribunal considers reasonable’



- **Not** ‘as soon as reasonably practicable’, but ‘within a reasonable time after the time limit expired’

University Hospitals Bristol NHS Foundation Trust v Williams EAT 0291/12

- **Factors**: extent and reason for delay, actions and knowledge (incl. what ought to have known) of the claimant
- **Reasons**: Ignorance or mistake, internal appeals, seeking legal advice, fault of an adviser, discovery of new facts or other exceptional circumstances, other pending legal proceedings, physical impediments.

Applications for Extension of Time: Discrimination Claims



- s123(1) Equality Act 2010: *(b) such other period as the employment tribunal thinks just and equitable.*
Broad test, providing less of scope for appeal
- No presumption in favour of the extension of time – key consideration is the balance of prejudice between the parties (*Robertson v Bexley Community Centre t/a Leisure Link* [2003] IRLR 434, CA). Most relevant factors: length and reasons for delay and prejudice to Respondent
- Useful to consider s33 Limitation Act 1980 factors - *British Coal Corporation v Keeble* [1997] IRLR 336. Current position: no need to follow the list of factors strictly, and it will only be problematic if the Tribunal does not consider a significant factor – *Southwark London Borough Council v Afolabi* [2003] ICR 800, CA (paragraph 33).
- At which stage should applications to extend time be made?
At liability stage (even if this means on appeal). A time limit point raised at a remedy hearing is *res judicata* - *Wilson Barca LLP and others v Shirin* *UKEAT/0276/19/BA (at 43)*

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Responding to a claim

➤ Rule 16 Employment Tribunal Rules of Procedure 2013

16.—(1) The response shall be on a prescribed form and presented to the tribunal office within 28 days of the date that the copy of the claim form was sent by the Tribunal.

➤ Rule 21 Employment Tribunal Rules of Procedure 2013 – if deadline is missed, tribunal can issue judgment in claimant's favour.

➤ Rule 20 Employment Tribunal Rules of Procedure 2013 – applications for extension of time for presenting response:

20.— (1) An application for an extension of time for presenting a response shall be presented in writing and copied to the claimant. It shall set out the reason why the extension is sought and shall, except where the time limit has not yet expired, be accompanied by a draft of the response which the respondent wishes to present or an explanation of why that is not possible and if the respondent wishes to request a hearing this shall be requested in the application.

(2) The claimant may within 7 days of receipt of the application give reasons in writing explaining why the application is opposed.

Impact of Covid-19

- Presidents of the Employment Tribunals in England & Wales and in Scotland (1 June 2020) – FAQ document: Questions 18 and 19
- Extending time limits for bringing claims:
 - *“...The time limits are set by Parliament. The Employment Tribunal is an independent judicial body. It has no power to change those time limits or to agree in advance that they do not apply. If a claim is presented late, a judge **may** still allow it to proceed. That sort of judicial decision is usually – although not always – taken at a preliminary hearing arranged for that purpose. The judge will usually have heard evidence from the claimant about the reason for the delay, and listened to arguments presented by the parties or, if they have them, their representatives. Such a decision will be based on the individual circumstances of the case and applying the relevant law.”*

Impact of Covid-19

➤ Extending time limit to respond to claims:

➤ *“The Presidents do not consider it appropriate to extend the 28-day deadline generally for all cases in the system where an ET1 claim form has been served...the Presidents would invite respondents to consider whether a more pragmatic approach during the pandemic is to complete a ‘holding’ ET3 response form. It might explain that further information will be provided when individuals can be contacted after the pandemic. Further information could be provided at a later stage...For those respondents who, as a result of closure, are unaware that they have been served with a claim, they should still send in a completed ET3 response form as soon as they can, even where the deadline has passed. It is still possible to do this even if a judgment has already been issued in the claimant’s favour because it was thought that the claim was not opposed. The late response form should be accompanied by an application for a retroactive extension of time under Rule 20. Once the claimant’s comments have been provided a judge may determine the matter without a hearing.”*

Impact of Covid-19

Did Covid-19 prevent the Claimant from filing an ET1 on time?

- If the failure to file was due to a medical reason, the Claimant should support the application with medical evidence as to the extent and effect of the illness: *The Midland Bank plc v Samuels* EAT 672/92.
- There are some exceptions. In *Norbert Dentressangle Logistics Ltd v Hutton* EAT 0011/13 an ET and EAT accepted the Claimant's own evidence, without any supporting medical evidence, that after his appeal was dismissed, he could not face doing anything as he was not functioning at all.
- Explain explicitly in the application what the Claimant could and could not do before the ET1 was filed.



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Q&A