EMPLOYMENT TRIBUNALS

Claimant: Dr M Davys

Respondent: Environment Agency

Heard at: London Central (remotely by CVP)
On: 26 May 2022

Before: Employment Judge Heath

Representation
Claimant: In person
Respondent: Mr J Morgan (In house solicitor)

JUDGMENT

The tribunal does not have jurisdiction to consider the claimant's claim as it was presented outside the time limits set out in section 111(2)(a) Employment Rights Act 1996 ("ERA") and time is not extended under section 111(2)(b) ERA.

REASONS

Introduction and issues

1. This was a preliminary hearing to determine whether the claimant's claim have been presented within the prescribed time limits, and if not whether or it was reasonably practicable for the claim to be presented in time, and if not whether it was presented within a reasonable time thereafter.

Procedure

2. Both the ET1 and the ET3 referred to the claim being presented out of time, and on 25 April 2022 the tribunal listed the matter today for a preliminary hearing to consider whether the tribunal has jurisdiction to consider the claim.

3. The ET1 set out some email correspondence between the claimant and his trade union representative, and between the claimant and ACAS. The claimant stated he had been poorly advised by his trade union representative and had therefore presented his claim outside the time limits.

4. Prior to the hearing the respondent sought disclosure of any documents as

between the claimant and his trade union representative that refer to the actual or potential bringing of employment tribunal proceedings. In particular it sought disclosure of a letter referred to in the claim form dated 23 November 2021. The claimant provided disclosure of some text messages between himself and his trade union representative, Mr Williams, and provided extracts from the 23 November 2021 letter.

5. The respondents further sought disclosure of "*any parts of the letter from Unison to the Claimant dated 23 November 2021 that contains reference to either (i) bringing to the attention of the Claimant the time limit for submitting a claim to a Tribunal and/or (ii) any confirmation that Unison would not be pursuing a claim on the Claimant's behalf" should be disclosed to the Respondent*".

6. If claimant responded to this request on 23 May 2022 saying "*I attach screenshots of the the relevant paragraphs from UNISON's letter to me of 23 November 2021. The only other reference to the time limit is Jay Williams' email of 24 January 2011 15:01, a copy of which I submitted in my ET claim form*". On the same day EJ Burns instructed that the issue as to whether the claimant should be asked to disclose any additional extracts from the letter dated 23 November 2021 will be considered at the preliminary hearing.

7. I was provided with a 64 page bundle and written submissions from Mr Morgan. At the start of the hearing the issue of further disclosure of the letter of 23 November 2021 was discussed. Mr Morgan suggested one possibility would be for the letter to be disclosed to me only, and for me to read the letter and order disclosure or otherwise and for me to recuse myself if this were appropriate. The claimant maintained that he had prior to the hearing questioned Mr Morgan on the relevance of the full letter, but had not got a reply. He considered that the letter was not relevant.

8. With the agreement of the parties, I did not order disclosure of the letter at that stage, but said that I would keep the matter under review. I made clear to the parties that judges are sometimes called upon to read disputed evidence, and are generally able to put disputed or even inadmissible evidence from their minds in their decision-making. I told the parties that if it came to it, I could read the full letter, make decisions on disclosure of parts of it, and ignore any privileged information within the letter.

9. In the event the claimant's evidence was such that I felt compelled to have the claimant send a letter to me for me to read, and to make a decision on disclosure. I determined that two additional paragraphs of the letter, which had not been included in the extracts the claimant supplied to the respondent, should be disclosed. They were disclosed by my cutting and pasting them into the chat function of the CVP room. I will set out those paragraphs, after I have set some context.

10. The claimant had disclosed two paragraphs of the 23 November 2021 letter. They read as follows:

> *"Constructive Dismissal – 3 months less 1 day from the termination date. This would usually be the end of notice period if one had been worked. However since your member was off sick limitation would start from the time he served his notice, which was at the end of September 2021. I do not have the acts dates for the above in order to advise on the primary limitation date.*
>
> *Early Conciliation has the effect of "stopping the limitation clock" for up to 6 weeks. Once the ACAS EC certificate is released, there is up to 1 calendar month to lodge a claim with the Tribunal stop the unique*

ACASEC Certificate number must be quoted on the ET1, otherwise a claim will not be accepted".

11. The claimant emailed the letter to the clerk who forwarded it to me. The letter was from the claimant's trade union representative, Mr Williams, informing him of legal advice given by the trade union's solicitors. Most of the contents of the letter was privileged, and I will not refer to it further. The two paragraphs which followed the two paragraphs already disclosed by the claimant were the final two paragraphs of the letter, and read as follows:

> *"Before a claim can be lodged with the Tribunal, it is compulsory to contact ACAS within the above primary limitation, to start Early Conciliation process. Their details are: 0300 123 1100 or online https://ec.acas.org.uk/ .*
>
> *Any submission would now need to be made without UNISON involvement, and any associated costs to be met you alone. I am sure that you will find this letter disappointing, but we are duty bound to follow the legal advice afforded by Thompsons Solicitors. You can still submit a claim to the Employment Tribunal, but I must reiterate that you do so without Unison assistance, and all costs will need to be met by yourself."*

12. The claimant had not produced a witness statement (no criticism is intended here as none had been ordered by the tribunal). The claimant gave oral evidence on oath and was cross examined by Mr Morgan. At the end of the evidence both parties made oral closing submissions. I gave an oral decision on the day. At this point in the hearing I was experiencing considerable technical difficulties, and I thank the parties for their patience, and apologise to them for keeping them waiting for longer than they had to when they were no doubt anxious to learn the result. The claimant asked for written reasons.

The facts

13. The claimant has an academic background, having studied mechanical engineering and received a doctorate in civil engineering. He has worked as a consultant in Britain and overseas working for oil companies. On 14 August 2017 he took up employment as an Adviser with the respondent, which is a Non-Departmental Public Body with statutory responsibility for the protection of the environment in England.

14. The claimant, to put it neutrally, had significant difficulties working at the respondent. He considered that the respondent was in repudiatory breach of his contract of employment such that on 18 August 2021 he gave notice of his resignation. It was agreed that his notice would take effect on 30 September 2021. This was the effective date of termination of his employment, applying section 97 ERA.

15. Prior to giving notice of resignation the claimant had been unhappy for some time, and had sought advice from a workplace trade union representative. He subsequently sought assistance from a full-time official, Mr Williams, who helped with discussions with the respondent. The claimant did not really know anything about the employment tribunal or how to bring a claim.

16. One of the things the claimant was discussing with Mr Williams was the bringing of a grievance. On 11 October 2021, after his employment had ended, the claimant put in his grievance, with Mr Williams mentioned as his trade union representative.

17. The claimant also wished to pursue without prejudice discussions with his

employer. The claimant's evidence, which I accept, was that Mr Williams suggested that it might assist these discussions if the claimant initiated the ACAS Early Conciliation procedure.

18. On 29 October 2021 the claimant looked at the ACAS website to see how to begin this process. At 10:45 am that day the claimant emailed Mr Williams saying that he was looking at the ACAS early conciliation service webpage. The claimant cut and pasted some of the information on that page relating to whether someone was helping with the claim. He asked Mr Williams whether he was happy for give Mr Williams's details and for ACAS to contact him. The claimant also had the following text exchange with Mr Williams.

> *"Claimant: Hello Jay - I have sent you an email with a couple of questions about the ACAS service.*
>
> *Mr Williams: Morning John. No problem for my details [to be] included on the Early Conciliation forms. Thanks Jay.*
>
> *Claimant: Thank you. Better to contact you or me? It says they'll contact you if you give them your details.*
>
> *Mr Williams: Me, in the first instance".*

19. The claimant commenced Early Conciliation process on 29 October 2021. He put Mr Williams' details down as a contact.

20. On 5 November 2021 Mr Williams conducted without prejudice discussions with members of the respondent's legal department. No settlement was reached.

21. On 8 November 2021 the claimant texted Mr Williams to say that ACAS had been in touch and will try and get hold of him. Mr Williams acknowledged this text. In ACAS Early Conciliation Support Officer was later to confirm that ACAS emailed Mr Williams on 8 November 2021 requesting contact, but none was forthcoming.

22. On 15 November 2021 an Early Conciliation certificate was issued and emailed to Mr Williams. No further attempts have been made to contact Mr Williams by ACAS.

23. On 23 November 2021 Mr Williams sent the claimant the letter dealt with in the section above headed Procedure. The letter contained the paragraphs set out at paragraphs 10 and 11 above.

24. The claimant was not satisfied with the advice and information given, and he wished to challenge it. From the end of November he made a number of attempts to contact Mr Williams by text and phone call. Mr Williams had in fact gone on holiday for six weeks from 3 December 2021.

25. The claimant contracted Covid over the Christmas period, and experienced significant fatigue. It is also the case that, following a stressful period of employment, the claimant found the process of putting in a grievance and bringing the matter to the tribunal a stressful one which triggered painful thoughts of his ordeal in employment.

26. Mr Williams was conducting the claimant's internal grievance. At some point prior to 19 January 2022 the claimant had a conversation with Mr Williams. The claimant's evidence, which I accept, was that on the question of trade union assistance for a tribunal claim, Mr Williams was somewhat defensive and said words to the effect "*We cannot do anything for you*". These are in fact the words used in evidence by the claimant.

27. The revised time limit, having regard to the extension provisions of section 207B ERA was 15 January 2022.

28. On 19 January 2022 Mr Williams represented the claimant at a grievance meeting held by Microsoft Teams.

29. On 24 January 2021 the claimant contacted ACAS on the telephone. He was told that an Early Conciliation certificate had been sent to Mr Williams, and this was provided by email.

30. The claimant emailed Mr Williams to let him know what he had heard from ACAS. Mr Williams replied:

> "*Spoke to them late November, before I went on leave. I said that we were still awaiting legal advice which may not be supportive. I went on leave on 3 December 2021. It turns out that the legal advice cited numerous issues, but mainly that the issues would be "out of Time" and wasn't supportive. Member received a letter dated 23rd December [this should read November] outlining the various points. I've since spoken to said member, and gone through the legal advice in detail."*

31. On 26 January 2022 the claimant emailed ACAS seeking confirmation of matters that have been discussed on the telephone. On 27 January 2021 ACAS emailed the claimant to confirm that an email had been sent to Mr Williams on 8 November 2021 requesting contact, but none had been received. The email confirmed the case was closed and an Early Conciliation certificate was issued on 15 November 2021 as it had not been progressed. The email further stated:

> *"Your next step, should you want to pursue the matter would be to make a claim at the employment tribunal. You typically have one calendar month minus one day in which to make a claim. Please note that your claim is potentially out of time".*

32. On 9 February 2022 claimant presented his claim to the tribunal.

The law

33. The time limit for bringing an unfair dismissal complaint is set out in section 111 of the Employment Rights Act ("ERA"), the relevant provisions of which are as follows:

> *s. 111(2) Subject to the following provisions of this section, 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.*
>
> *(2A)Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2)(a)*

34. Section 207B ERA provides:

> *(1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").*

(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.

35. The test of practicability means what could have been done not what would have been reasonable. Reasonably practicable does not mean "reasonable" or "physically possible" but is analagous to "reasonably feasible" (see *Palmer and Or v Southend-on-Sea BC* 1984 ICR 372, CA). The burden of proof is on the claimant to show that it was not reasonably practicable to present the claim in time *Consignia v Sealy* [2002] IRLR 624.

36. In *Walls Meat Co v Khan* [1978] IRLR 499 it was held a claimant could reasonably have been expected to be aware of their rights and aware of the relevant time limit but nonetheless lodged the claim outside any extended time limit it is "*their fault and they must take the consequences*". It was also said that ignorance or mistake, "*will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably have made*."

37. Where a claimant's skilled advisors fail to submit a claim in time, the tribunal will usually consider that it was reasonably practicable for the claim to have been presented in time (*Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379). For the purposes of this principle trade union officials are considered skilled advisors (*Times Newspapers Ltd v O'Regan* [1977] IRLR 101, and *Syed v Ford Motor Co Ltd* [1979] IRLR 335.

Conclusions

38. The evidence is that ACAS attempted to contact Mr Williams on 8 November 2021, and sent the Early Conciliation certificate to him on 15 November 2021. The claimant was unaware of this, it would appear.

39. However, from 25 November 2021, which was when the claimant received the letter from Mr Williams dated 23 November 2021, the claimant was aware that his trade union would not going to assist him with the tribunal claim. This was crystal clear from the letter.

40. The question I have to consider was whether it was reasonably practicable for the claimant to put his claim in on time. I bear in mind the following factors:

    a. The claimant is a highly intelligent man who, I suspect, has far superior research skills to most of the people who come before the tribunal;

    b. The claimant had himself contacted ACAS and done some research on their website. He knew where to look for information, as he had visited the website before;

c. his trade union representative, in the letter of 23 November 2021, had actually pointed him once again to the ACAS website.

41. It is understandable that the claimant wished to query what his trade union was telling him in this letter. It is also understandable, as the claimant told me, that the emotional reaction he had to his difficult employment meant that he did not want to confront issues which he found triggered an adverse response. I also accept that the claimant was unwell with Covid over the Christmas period and was experiencing significant fatigue.

42. However, from 25 November 2021 it must have been clear to the claimant that ACAS would not be assisting him with the tribunal claim. It was clear that there was some sort of time-limit to his bringing a claim. When he did not succeed in getting through to Mr Williams to query the contents of the letter the prudent thing to do would have been to make his own investigations. If it was not clear to him that he was facing a deadline in mid January 2022 then such ignorance, in all the circumstances and taking into account the claimant's personal characteristics, was not reasonable.

43. At first blush, the evidence may have suggested that it was the claimants union representative who was largely responsible for the claimant not being brought in time. However, the passages of the letter, disclosed for the first time during the hearing, make clear that from late November 2021 the claimant bore responsibility for taking his claim forward. The responsibility for not bringing the claim in on time is his. I consider that, even given his difficulty tracking Mr Williams down, his own state of health, and his feelings of stress at having to confront difficult issues, it would have been reasonably feasible for the claimant to have swiftly discovered what the time limit for bringing a claim was and to have brought a claim. I consider that it was reasonably practicable for the claimant to present his claim on time.

44. Had I concluded that it was not reasonably practicable for the claimant to have presented his claim on time, I would then have had to consider whether he brought his claim within a reasonable period thereafter. I note that he was told unequivocally by ACAS on 27 January 2022 that his claim was "potentially out of time", and yet he did not present his claim for another 13 days. The claimant did not account for why he had not presented his claim more swiftly. I would have found in the alternative that the claimant had not presented his claim within a reasonable period thereafter.

45. In all the circumstances the tribunal does not have jurisdiction to consider the claim.

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Employment Judge **Heath**

1 June 2022_____
Date

JUDGMENT & REASONS SENT TO THE PARTIES ON

01/06/2022.

FOR THE TRIBUNAL OFFICE