EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Ms A. Spence v Four Seasons Health Care Limited

Heard at: Watford **On**: 31 January 2017

Before: Employment Judge Heal

Appearances

For the Claimant: Ms K. Taunton, FRU bar student
For the Respondent: Mr. S. Chegwin, solicitor

Judgment was sent to the parties on 2 February 2017. The claimant made a request for written reasons by email on 3 February 2017. Accordingly, written reasons are provided.

REASONS

1. By a claim form presented on 7 October 2016 the claimant made a complaint unfair dismissal.

   Issues

2. ACAS received notification for the purposes of early conciliation on 22 September 2016. The early conciliation certificate was issued by ACAS on 6 October 2016.

3. The respondent sent the claimant a letter dated 17 May 2016 terminating her contract of employment without notice, by reason of gross misconduct.

4. The parties both agree that the claimant probably received this letter on 23 May 2016 and accordingly by consent of the parties I have accepted that as the effective date of termination.

5. That being the case, absent section 207B of the Employment Rights Act 1996, time would have expired for presentation of the claim form on 22

August 2016. The claimant did not approach ACAS until one month later. Her claim is therefore out of time, as both parties accept.

6. Therefore, the question before me at this preliminary hearing is whether I am satisfied that it was not reasonably practicable for the claim to be presented before the end of the period of 3 months beginning with the effective date of termination. If I am satisfied of that, has the claim has been presented within such further period as I consider reasonable? (Section 111(2) ERA 1996).

7. At the outset of the hearing, Ms Taunton for the claimant identified the impediment relied upon as:

   '*the claimant received assistance from the trade union Unison which led to confusion about who was responsible for the claim. The representative of Unison wrote to the tribunal to say that they were not representing the claimant. The claimant understood that the union was handling the case. This led to confusion that caused the delay.*'

8. I have had the benefit of a bundle which ran initially to 29 pages. However, partway through the claimant's evidence, she produced a collection of further original documents which had not been disclosed to the respondent.

9. These documents included Unison's terms and conditions for giving assistance, the booklet 'Making a claim to the Employment Tribunal' and an undated letter from Unison to the claimant.

10. Therefore I allowed a postponement to enable those documents to be reviewed by Ms Taunton, for disclosure to be made as appropriate, for consideration by the respondent and for sufficient copies to be taken to enable the hearing to continue. Those new documents were added to the bundle by consent.

11. I heard oral evidence from the claimant who gave evidence in chief by means of a prepared witness statement. She was then cross-examined and re-examined in the usual way.

12. The respondent did not call any evidence.

13. I am grateful to both representatives for providing me with copies of the relevant authorities as follows:

    Wall's Meat Co. v Khan [1979] ICR 52.
    Dedman v British Building and Engineering Appliances Ltd [1974] 1 WLR 171.
    Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470
    London Borough of Islington v Brown EAT 0155/08
    Alliance and Leicester plc v Kidd EAT 0078/07
    Palmer v Southend on Sea Borough Council [1984] ICR 372

Facts

14. I have made findings of fact on the balance of probability as follows.

15. The claimant's evidence has not been particularly clear. She is not of course a lawyer. She worked for the respondent as a healthcare assistant. She has told me repeatedly that she did not understand what her union was doing on her behalf, that she did not understand the law, that she did not understand what her union was asking her to do, that she had no experience, that she could not say what she did not know, that she could not remember receiving particular letters and that she knew nothing. I formed the impression that, although she probably did not have an educated understanding of was happening about her claim or about the exact requirements of the law, she was in this hearing also taking refuge behind her assertions of lack of knowledge or understanding. Therefore, I do not feel wholly that I can rely upon her assertions of ignorance and I am not confident that she has been entirely open with me.

Chronology

16. By letter dated 17 May 2016 the respondent summarily dismissed the claimant for gross misconduct, following a hearing on 12 May 2016. The claimant had not attended the disciplinary hearing. The precise reasons for the dismissal are not relevant to the issues before me.

17. On the balance of probability, the claimant received that letter on 23 May 2016.

18. The claimant attended an appeal hearing on 13 June 2016 at which she was accompanied by Mr Abu Sankoh, Unison representative.

19. At that hearing, the respondent decided that at least some of the allegations against her were well founded. The respondent had also given the claimant time to produce documentary evidence to explain her non-attendance at a previous hearing, due to an emergency family situation. That documentation had not been received by the respondent and therefore the decision to uphold the appeal was made without it. The claimant was told that that decision was final.

20. The claimant had been seeking assistance from her union, Unison, and in particular from Ms Rose Minty-Tutton, Branch Secretary from 2014. (The claimant referred to Ms Minty-Tutton as 'Ms Minty'.)

21. The claimant believes that Unison received the letter dismissing her appeal and that after receipt of that letter, Ms Minty-Tutton told the claimant that the dismissal was unfair.

22. The claimant trusted her union when it told her that she could bring a claim. She relied upon her union to know the law. She said that Ms Minty-Tutton told her from the very beginning that the union would deal with her case.

23. Ms Minty-Tutton called the claimant and the claimant went to see her and talked about bringing a claim. This was after the June appeal hearing although it is difficult to understand from claimant exactly when this took place.

24. At some point, the union gave to the claimant what appears to be a card giving the name of her Unison representative as Abu/Rose. The card is undated but on balance of probability I find that it was given to the claimant during this period of time while the union was beginning to discuss with her a possible claim. Amongst other things this document says,

    ‘*Your case has now been referred to the UNISON representative whose name and contact details are recorded below. Assistance will be provided in accordance with UNISON’s scheme for representing members and the conditions outlined overleaf.*

    If, following your initial discussions, it is agreed that the representative will act on your behalf, any action will normally be done in consultation with yourself.

    …

    Conditions for providing assistance

    …

    ‘5. Until UNISON or its solicitors confirms in writing that it is acting for you in a legal claim, any responsibility for lodging a claim in an Employment Tribunal or Court (including County Courts, Sheriff Courts and appeal Courts) is yours alone.’

25. I find that at the same or about the same time, the union gave the claimant a yellow booklet entitled ‘Making a claim to an Employment Tribunal’.

26. Amongst other things, that booklet contains the following:

    ‘*How soon must I make my claim to an employment tribunal?*

    Claims to employment tribunals must be made within strict time limits. In most cases the tribunal must receive your claim within 3 months from the date your employment ended or when the matter you are complaining about happened.’

27. Although the claimant was busy with family responsibilities, I find that she did not make reading and understanding this booklet a priority and she did not read it, although she could have done.

28. Ms Minty-Tutton wrote the claimant’s claim form for her and then gave it to her to post. The claimant says that she did not know why she was asked to post it but she did what she was told.

29. She agreed that her union effectively did everything for her and that they were representing her throughout. She said that the union was responsible for making sure the form was put in on time because she had no idea about the matter. She says that she just did what they told her to do. The claimant did not give a clear answer to the question whether she received anything in writing from the union confirming that it was acting for her in a legal claim.
30. In July or August 2016 Ms Minty-Tutton told the claimant that there was still time to put a claim in. There was therefore some communication between the union and the claimant about time limits.

31. Ms Minty-Tutton spoke to ACAS on the claimant's behalf on 22 September and that is 'day A'.

32. A man called the claimant and told her that a form had not been filled in or not filled in properly. The claimant passed this information on to Ms Minty-Tutton. The claimant said, '*they do one first and did not complete and cancelled that number'*. I infer that there was some confusion about commencing the claimant's claim and that ACAS early conciliation had to be restarted for some reason.

33. The claim form was presented on 7 October 2016.

34. By undated letter which the claimant says she received in December at some time before Christmas, Unison wrote to her,

'*Dear Ms Spence,*

I refer to our discussion concerning your case and wish to confirm the decision of the branch that UNISON can no longer assist you in this matter. This decision is based on our view that:

a) *You have misled us in regards to the reason for your absence from your disciplinary hearing in May 2016….*'

35. By email dated 5 December 2016 Chong Ma of Unison wrote to the tribunal saying that the claimant did not meet the criteria for legal representation by Unison and that she had claimed erroneously that Unison were representing her. Unison confirmed that it was not involved in the claimant's claim against the respondent.

Submissions

36. Mr Chegwin said that it was for the claimant to discharge the burden of showing that it was not reasonably practicable to present the claim in time. He said that she had not discharged that burden. He relied upon Palmer and the test, '*was it reasonably feasible to present the complaints to the industrial tribunal within the relevant 3 months?*'

37. Mr Chegwin said that the test was fact sensitive. On these facts, he submitted, the claimant knew or ought to have known of the right to bring a

claim. He said that she would have done so had she exercised reasonable diligence. She had been told about unfair dismissal and time limits had been mentioned to her. She had been given a booklet by her union and had she read it, she would have known of the time limits. It was unreasonable of her, he said, not to read that booklet.

38. He said that the claimant had been represented by Unison through her dismissal, her appeal and the process of submitting the claim. He said that they were assisting her and then later expressly confirmed that they were withdrawing their support. Therefore, he said it was clear that the claimant was represented by her union during the period of submitting the claim form. He said that Unison should have advised the claimant of her rights. The claimant should have asked her advisers how to go about submitting the claim. He said that the claimant seemed to admit that the blame lay with her union and took no responsibility on herself.

39. Mr Chegwin took me to Dedman and the principle that if a claimant goes to skilled advisers and they make a mistake then the claimant must abide by her advisers' mistake. If therefore advisers mistake a time limit and present a claim too late then the claimant is out of time and her remedy lies against her advisers. If a claimant is at fault or her advisers are at fault in allowing the time limits to slip by, she must take the consequences. By exercising reasonable diligence, the complaint could and should have been presented in time.

40. Mr Chegwin said that this principle extended to trade unions. His primary submission was that if the union was at fault then the remedy was against them, not the respondent. In any event, he said, the claimant should have used appropriate diligence to discover the time limits for herself.

41. The respondent said further that this claim is not analogous to the situation in Williams – Ryan. Mr Chegwin said that the Court of Appeal found in that case that the tribunal had been generous and that reliance has been placed upon the fact that the respondent had told the claimant of the right to bring a claim. That did not apply here. Mr Chegwin also contrasted the facts of this case in which there was substantial contact with the union, with the facts of Williams-Ryan when there was a 'fleeting telephone call' with the Citizens' Advice Bureau. He pointed out that Williams Ryan had been decided before there was binding authority that the Dedman principle was extended to trade unions.

42. In the alternative, Mr Chegwin said that if it had not been reasonably practicable to present the claim in time then the claim had not been presented within such further period as was reasonable.

43. Miss Taunton for the claimant said that there was a difference between advice and representation. She said that advisers giving representation would manage a case in its entirety including presenting the claim form. She said that unions are careful not to present claims unless they have said for certain that that is what they are going to do. She said that there was limited information from Unison except for the letter from Unison that it was not

legally representing the claimant. Therefore, she said the tribunal was left with the claimant's account.

44. Miss Taunton submitted that what might have happened was that Ms Minty-Tutton was providing support and assistance to the claimant as friend and adviser but not as her union. She said that was important because there may be a distinction between being able to make a claim against the union and not being able to do so. There was she said nothing from Unison to suggest that they took responsibility.

45. Miss Taunton relied upon Williams-Ryan at paragraph 32. It may well depend on who gives the advice and in what circumstances whether Dedman applies. She accepted the Dedman principle and that it applied to the trade union situation. However, she said, it did not apply to these facts. There was nothing to show that the union had accepted that it was handling the case and therefore there was a mutual misunderstanding so that this was an occasion for the tribunal to be generous. She said that there was not enough to show that Unison were at fault. Taking advice did not prevent the claimant from showing that it was not reasonably practicable for her to present her complaint in time.

46. Ms Taunton said that it was reasonable for the claimant to be ignorant of the time limit. The claimant was a layperson and had consulted her trade union for assistance. She did not turn her mind to the time limit and her ignorance was reasonable. It was reasonable for the claimant to think that she was doing everything that she should have done. The claimant was not at fault and therefore the authorities did not apply in this case.

Concise statement of the law.

47. There are two stages to the approach to resolving the issue before me. First, the claimant must show that it was not reasonably practicable to present her claim in time. The burden of proving this rests firmly on the claimant. Second, if she succeeds in discharging that burden, I must be satisfied that the time within which the claim was in fact presented was reasonable

48. May LJ, who gave the judgment of the court in Palmer proposed the test of '*reasonable feasibility*'. His wider reasoning is instructive:

> '*[W]e think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view that is too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done…In the context in which the words are used in the 1978 Consolidation Act, however ineptly as we think, they mean something between these two. Perhaps to read the word "practicable" as the equivalent of "feasible" … and to ask colloquially and untrammelled by too much legal logic—"was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?"—is the best approach to the correct application of the relevant subsection.*'

49. So, the correct approach lies between the two poles of construction: pure reasonableness and physical possibility.

50. I find further guidance in the *Wall's Meat* case, at page 60 F to H where Brandon LJ said this:

‘The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such inquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him'.'

51. Although the claimant’s subjective view is relevant, her mere assertion of ignorance either as to the right to claim, or the time limit, or the procedure for making the claim, is not conclusive.

52. There is no dispute between the representatives that the Dedman principle is capable of applying to trade unions. It seems to me however that I should not mechanistically find that just because the claimant has put matters in the hands of her trade union and because the claim has been presented out of time then the trade union is necessarily at fault and the claimant must be fixed with their fault. I must look at the facts of this individual case

Analysis

53. The facts of this case are not straightforward in that, perhaps because the claimant has not given a complete picture, they do not fit neatly into the facts of the established authorities. I have not however taken the claimant’s simple assertions of ignorance wholly at face value.

54. Unison is a large and experienced union. The process for presenting a complaint of unfair dismissal to the employment tribunal is well known territory. The undated letter of December 2016 makes it clear that Unison had accepted responsibility for the claimant’s claim until that point. I am not convinced by the lack of a letter expressly accepting responsibility in accordance with clause 5 as evidence that they had not accepted responsibility. I am not wholly confident that the claimant would produce such a letter if it exists. I prefer to rely on the undated December letter.

55. In any event, it is clear to me that the union had accepted a high degree of responsibility for the claimant's claim. If Ms Taunton is correct and there has indeed been a misunderstanding as to the degree of responsibility accepted, and if Ms Minty-Tutton was acting only as a friend and adviser as Ms Taunton speculated; then she or the union should have said so very clearly to the claimant. Instead, as a minimum, the union sent a clear implied message to the claimant that it was taking responsibility for presenting her claim in time. It helped her to fill in the forms, it helped when forms were returned, it contacted ACAS for her and told her in July or August that there was still time to present a claim. It appears that the union did not clearly tell the claimant that the responsibility for presenting the claim in time was hers and hers alone. I find this despite clause 5 of its terms and conditions for the reasons already explained.

56. Either the union did expressly accept responsibility but I have not been shown the letter, or its conduct waived its terms and conditions and communicated to the claimant that it was accepting responsibility. Even if, putting the claim at its very highest for the claimant, there was a misunderstanding it was for the experienced union to make sure that such misunderstanding did not arise.

57. Therefore, I consider that the union did accept responsibility for presenting the claim in time or for making sure that the claimant knew to do so. It was a skilled adviser; it cannot be said in the circumstances of this case and on the evidence before me that it was not reasonably practicable to present the claim in time. Therefore, there is no jurisdiction.

58. If I were wrong about that, and if the union had left the responsibility in the hands of the claimant, and if the claimant was indeed ignorant of the time limits, then that ignorance was unreasonable. She had been given the booklet which told her clearly the 3 month time limit. On her own evidence, Ms Minty-Tutton mentioned the issue of time to her in July or August. Although the claimant has family responsibilities which keep her busy, nonetheless she should reasonably have grasped the importance of the booklet that she was given and have made time to read it.

59. For all those reasons it was reasonably practicable to present this complaint in time. Either the union should have done it or it should have made it clear that it was not going to do it. If it did that, then the claimant had the information in her possession to enable her to do it herself.

Costs

60. The respondent made an application under rule 76 for its costs. It sent a cost warning to the claimant in December 2016. Mr Chegwin said that there was no reasonable prospect of the claim succeeding. He claims the sum of £2500 although he said that his client's costs were more than that.

61. Mr Chegwin submitted that the claimant had acted unreasonably in continuing to pursue her claim despite having been informed by the respondent that the claim was bound to fail. He said that it was unreasonable for the claimant to

proceed from the point at which she was warned and therefore he claims the costs from 20 January when Ms Taunton came on the record for his preparation to the date of this hearing.

62. Ms Taunton said that for such an application to succeed, the claim would need either to be misconceived or to have no reasonable prospect of success. She said that there was a question about the skilled adviser principle and whether it applied. Just because the claimant had lost, did not mean that she was bound to fail. She said that the claimant had not acted unreasonably and she had a genuine issue to be heard. The claimant, she said, did her best to give evidence without malice or bad behaviour.

63. Rule 76 says as follows:

'(1) A tribunal may make a costs order… and shall consider whether to do so, where it considers that-

(a) a party (or that party's representative) has acted vexatious, abusively, disruptively or otherwise unreasonably in either bringing the proceedings (or part) all the way that the proceedings (or part) have been conducted; or
(b) any claim or response had no reasonable prospect of success;
…'

64. I consider that this complaint had no reasonable prospect of success. In the circumstances, there was no reasonable prospect of the claimant discharging the burden of showing that it was not reasonably practicable for her to present the claim in time.

65. I note that the claimant had a warning from the respondent, but that does not prove that there was no reasonable prospect of success or that she should have known that.

66. However, the claimant had the benefit of some legal representation at least latterly. Even though it was possible for the claimant to assert that there was or might have been a misunderstanding, some common sense is called for. It must have been clear on the documents in the claimant's possession at least that either the union or the claimant must have been at fault. It is quite possible that the claimant had not told Ms Taunton that she possessed the booklet, 'Making a claim to a Employment Tribunal' or the undated December letter from Unison. Nonetheless, these documents were in the claimant's possession so that it should have been clear that either the union had taken responsibility at the relevant time or that the claimant did in fact know or should reasonably have known about the time limits.

67. There does not need to have been 'bad behaviour' for the tribunal to make an order for costs. It has in fact been very pleasant to have the claimant in the tribunal for this hearing. There has been nothing wrong with her behaviour here.

68. I do not necessarily make an order for costs when I have found that there were no reasonable prospects of success. There is a discretion in the tribunal whether or not to do so. I have asked whether she should reasonably have known that there was no reasonable prospect of succeeding in this application. I have found that she should reasonably have known that. Subject to the claimant's ability to pay it seems to me appropriate in this case to make the order.

Amount

69. Rule 78 makes provisions about the amount of a costs order. I may order the claimant to pay the respondent a specified amount, not exceeding £20,000 in respect of the respondent's costs.

70. Mr Chegwin does not ask for a detailed assessment. He suggested an order of £1500 or £1000.

71. Mr Chegwin told me that he has 2 years post qualification experience. He belongs to the employment department of Evershed's and is based in Manchester whose rates are cheaper than those in London. He claimed for one hour's preparation but it would surprise me if in fact he managed to prepare for this hearing (which he appears to have done meticulously) in one hour. Nonetheless to claim for one hour appears to me to be reasonable. It is reasonable to use Manchester rather than London solicitors. It appears to me that Mr Chegwin has been at least as cost-effective as using counsel.

Ability to pay

72. Rule 84 provides that in deciding whether to make a costs order and so in what amount, I may have regard to the claimant's ability to pay.

73. The claimant is not working and receives jobseekers' allowance of £229.70 every fortnight. She receives child benefit of £192.40 per month. She lives with her partner who has a disability and does not work. He receives disability benefits but the claimant is not sure which benefits he receives or how much he receives. He does receive housing benefit. The property in which they live belongs to the claimant's partner. They have no debts, no other property and have no significant assets. They pay approximately £66 per month for gas and electricity. The claimant has 3 children living with her aged 14, 10 and 5. One of her children has a disability and therefore has special assistance for school.

74. Taking all that into account, although the sum claimed by Mr Chegwin is reasonable, the claimant does not have the ability to pay that amount or anything like it. I ordered her to pay therefore the sum of £100.

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Employment Judge Heal

Date: 27/03/2017

Sent to the parties on: 30/03/2017

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For the Tribunal Office