EMPLOYMENT TRIBUNALS

BETWEEN

Claimant **Respondent**

Jay Clement -v- F&L Hostel and Catering Ltd

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Exeter **ON** 29 November 2018

EMPLOYMENT JUDGE: PSL Housego

Representation

For the Claimant: In person
For the Respondent: Ms S Hornblower, of Counsel, instructed by Wollen Michelmore, solicitors

JUDGMENT

1. The claim is struck out as out of time.
2. The respondent's application for costs is dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's claim was presented in time.

2. I have heard oral evidence from the claimant, and I have heard submissions both from him and from Counsel for the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

3. The claimant's employment came to an end on 15 December 2017. While there was earlier some doubt in the claimant's mind about the exact date, that is not relevant as any other date would have been earlier, and so he cannot have been disadvantaged.

4. The claimant swiftly took advice from the CAB and well understood that a claim had to be filed within 3 months, that early conciliation ("EC") from ACAS was a prerequisite of being able to file a claim, and that this took a month and then extended the time by a further month. At the time he thought the date of his dismissal was 06 December 2017, and so on 05 March 2018 notified ACAS in accordance with the EC procedure, this being (he thought at the time) to be the last day that he could do so without being out of time.

5. The Acas EC certificate was issued automatically 1 month later, on 05 April 2018. It was sent to the claimant by email only. I accept his evidence that he had never seen that email. Whether he had given the wrong email address, or it got lost in cyberspace, or he failed to see it, or it was sent to junk as spam is immaterial.

6. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 at regulation 9 provide:

   "(2) If the prospective claimant or prospective respondent has provided an email address to ACAS, ACAS must send the early conciliation certificate by email and in any other case must send the early conciliation certificate by post.

   (3) An early conciliation certificate will be deemed received—
   (a) if sent by email, on the day it is sent; or …"

7. Accordingly the EC certificate was deemed received on 05 April 2018. The last date for filing the claim was 1 month after that, so 05 May 2018.

8. On 16 April 2018 a conciliator emailed the claimant, in reply to an email from him. In her email she referred to an earlier email of 12 April 2018 from a colleague. The claimant replied to say that he had received no such email (reinforcing the conclusion that he did not receive the EC certificate, as this predated the expiry of the limitation period). He responded that he was still waiting to hear if *"early consultation"* was an option (again indicative that he had not received the EC certificate). His email was by clicking the "reply" button which imported the heading of the email under reply. That contained the EC certificate number, but the appellant did not notice this, or if he did was unaware what it was.

9. The appellant then phoned Acas on 04 and 05 May 2018 as he was concerned about the limitation period expiring. This was because he knew

that 05 March was the last day for applying for the EC procedure, that the EC procedure took 1 month, and that there was a month after the issue of the EC certificate to issue the claim. He knew all the relevant time limits.

10. He could get no adequate reply from Acas and one person said that they did not give out EC certificate numbers on the phone. He phoned the ET office as well. He did not go back to the CAB. He thought, from what someone told him, that the fact that he had started the form on line meant he was in time. He knew that he could not submit it on line without the EC certificate number, because he tried to send it before 05 May 2018 and the system would not let him do so.

11. Finally, on 11 May 2018, he found out the number, on the phone, probably about 3:30 pm, as his mother's telephone bill shows a call then (he did most things to do with the claim from his mother's home). On 12 May 2018 he lodged the application on line, having again checked it. Accordingly it is 7 days out of time.

12. The appellant says that he did all he could so that it was not reasonably practicable for him to lodge the claim until he got the EC certificate number, and as he had contact with Acas after 05 April 2018 thought there was still early conciliation in process.

13. Having established the above facts, I now apply the law.

14. The relevant statute is the Employment Rights Act 1996 ("the Act"). Section 111(2) of the Act provides that an Employment Tribunal *shall not consider* a complaint of unfair dismissal unless it is presented before the end of the period of 3 months beginning with the effective date of termination, or 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. This 3 month period is extended by the EC provisions, as set out above (my emphases).

15. Under subsections 23(2) and 23(4) of the Act these provisions are effectively replicated for unlawful deduction claims, and similarly these provisions are effectively replicated for breach of contract claims under Article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994. There are similar provisions for accrued holiday pay claims under Regulation 30(2) of the Working Time Regulations 1998.

16. Counsel for the respondent referred me to the following cases:

- Dedman v British Building and Engineering Appliances [1974] 1 All ER 520 and [1974] ICR 53;

- E T Marler Ltd v Robertson [1974] ICR 72;
- McPherson v BNP Paribas (London branch);
- Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119;
- Oko-Jaja v Lewisham Borough Council [2001] UKEAT 417_00_0805;
- Health Development Agency v Parish [2004] IRLR 550;
- Yerrakalva v Barnsley MBC [2012] 2 All ER 215; and
- Sunuva v Martin [2017] UKEAT/0174/17.

17. I note that the following cases are relevant to time points:

- Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372;
- Wall's Meat Co v Khan [1978] IRLR 499;
- Riley v Tesco Stores [1980] ICR 323;
- Croydon HA v Jaufurally [1986] ICR 4 EAT;
- London Underground v Noel [1999] ICR 109;
- British Coal v Keeble [1997] IRLR 336 EAT;
- Robertson v Bexley Community Service [2003] IRLR 434 CA;
- Department of Constitutional Affairs v Jones [2008] IRLR 128 EAT; and London Borough of Southwark v Afolabi [2003] IRLR 220 CA;

18. The words of the statute are mandatory - *"shall not consider"* a claim made out of time unless it was *"not reasonably practicable"* to lodge it in time, and then only if lodged in such further period as is reasonable in all the circumstances.

19. The claim was out of time, as set out above. Once an unfair dismissal claim is out of time it is irrelevant by how much.

20. The claimant says that it was not reasonably practicable to file the claim in time as he did not have the EC certificate and did not know that it had been issued. He says he thought that as Acas were still involved there was still EC going on. He says that he was told that because he had started filling in the claim form online he was safe on the time point and that Acas and the ET staff led him to that conclusion.

21. I cannot accept that this means that it was not reasonably practicable to file the claim in time. The claimant knew that time was about to run out, which was why he chased the matter up with Acas on 04 May 2018. He did not try and file the form by ticking the box that says that he has no EC certificate number. He did not send in a claim form in the post or by hand. He did not go back to the CAB to ask what to do. He chose to lodge his application for EC on the last date he thought was possible, and he intended to lodge his claim at the last moment. He may have had good reason to do so (hoping that conciliation would be successful) but that was his choice. He knew that the claim form had to be submitted online, and could be altered at any time.

If he genuinely thought that the process had started and he was in time because he had started the online form he was mistaken, but that is not the same as it being not reasonably practicable to file the claim. In any case I do not accept that he thought that time stopped running because he had started the process of getting the online form completed. If that were so it is obvious that there is then no determinable end date for lodging a claim, and the appellant well knew that there was a rigid time limit.

22. Accordingly the claim must be struck out as out of time.

23. Even if I had found that it was not reasonably practicable for the claim to he filed in time, the appellant's whole case on the *"not reasonably practicable"* point is that the claim was ready to go as soon as he had the EC certificate number. However he did not send it the day he got the number but the next day. He did not say that there was any reason why he could not have sent it immediately, but that he wanted to check it over again. If the EC certificate had been received the last day for filing the claim, the claim would have been out of time if filed the next day. In the same way, the further reasonable period for filing the claim would have to end the day he got the certificate, absent any reason why it could not be filed that day, and none was put forward. Therefore the claim would still fall to be struck out.

24. The respondent asked for costs. The time point had been put forward early on. While a costs warning letter was not necessary one was given, and in that letter the respondent had offered to make no claim for costs if the claimant withdrew the claim. In addition the respondent pointed to a series of matters where it was said that the claimant had behaved unreasonably (identified in paragraph 29 of Counsel's skeleton argument).

25. I considered carefully the provisions of the ET rules about costs. Rule 76:

> *"When a costs order or a preparation time order may or shall be made*
>
> *76.—(1) A Tribunal may make a costs order or a preparation time order, and* ***shall consider whether*** *to do so, where it considers that—*
>
> *(a)* ***a party*** *(or that party's representative)* ***has acted*** *vexatiously, abusively, disruptively or otherwise* ***unreasonably*** *in either the* ***bringing of the proceedings*** *(or part) or t****he way that the proceedings (or part) have been conducted****; or*
>
> *(b) any* ***claim*** *or response* ***had no reasonable prospect of success****.*

*(2) A Tribunal may also make such an order where a party has been in **breach of any order** or practice direction or where a hearing has been postponed or adjourned on the application of a party.*

(3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

(a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and

(b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.

(4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.

(5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing."

26. It is submitted by the respondent that the claimant acted unreasonably in not withdrawing the claim and in the other ways identified in paragraph 29 of the skeleton argument, and (the same point put another way) the claim had no reasonable prospect of success as it was out of time. It is also asserted that the claimant was in breach of some Tribunal orders.

27. I deal first with points said to be unreasonable conduct by the claimant other than not withdrawing the claim. This is a claimant in person. I see no evidence of him being deliberately difficult, and his whole demeanour in the Tribunal suggests that the reverse is the case. He made some mistakes (such as sending his witness statement to the Tribunal and not sending a copy to the respondent), but litigants in person make mistakes. If the case had gone to a full hearing (and it had been listed for such a hearing only for that date to be vacated for lack of judicial resource) and the claimant had lost, these mistakes were not such as were likely to lead to any judge making a costs order against the claimant. They should not do so at a preliminary hearing where the merits are not considered, and so the respondent not disadvantaged. In so far as there may have been additional

work for the respondent, even if so, that is not synonymous with the claimant being unreasonable. Breach of Tribunal orders very seldom results in a costs order being made. Any breach of an order by the claimant has not affected the proceedings for the respondent in a prejudicial way, as the claim has been struck out on the time point.. Finally, the rule only requires a Tribunal to consider making a costs order if a party is unreasonable, or has no prospect of success, which is to confer upon the judge a discretion. I decline to exercise that discretion for the reasons given.

28. I note that time limits are now very complicated, with the EC procedure. Many lawyers get them wrong. I accept the claimant's evidence that he has never seen the email with the EC certificate. He was still involved with Acas about the claim after the time limit expired. He thought that meant he was still in the EC procedure (of course that relates only to people who are not yet claimants and he was a claimant after 12 May 2018 when the claim was lodged. Costs orders are relatively seldom made in Employment Tribunals for the public policy reason that there is not a costs follow the event rule in Employment Tribunals so that claimants with good claims are not too frightened to pursue them through fear of costs if they lose. Being wrong is not synonymous with being unreasonable. I do not find this claimant unreasonable. He had a genuine sense of grievance against his former employer, and was trying to follow the time limits he knew existed. He did not see the EC certificate. He thought that was reason enough why his claim should not be struck out. I did not accept his argument (though I accepted his evidence about the certificate), but that does not mean he was unreasonable in seeking to keep his claim alive. I decide that the actions of the claimant do not fall within the costs regime of the Employment Tribunal and so dismiss the respondent's application for costs.

Employment Judge PSL Housego
Dated 30 November 2018

Judgment sent to Parties on

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