EMPLOYMENT TRIBUNALS

Claimant Mrs S Peacock

Respondent: Murrayfield Lodge Limited

HELD AT: Hull **ON:** 15 November 2018
7 January 2019
(reserved decision in chambers)

BEFORE: Employment Judge Cox

Representation:
Claimant: Mr J McHugh, counsel
Respondent: Miss L Howes, solicitor

RESERVED JUDGMENT

1. The claim has been presented outside the statutory time limit.

2. It was reasonably practicable for the claim to be presented within that time.

3. The Tribunal has no jurisdiction to consider the claim and it is dismissed.

REASONS

1. Mrs Peacock presented a claim to the Tribunal alleging that she had been unfairly dismissed by Murreyfield Lodge Limited ("the Company"). A Preliminary Hearing was held to decide whether the Tribunal should dismiss her claim as having been presented out of time.

The relevant legislation

2. The general rule is that a claim of unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination of the Claimant's employment. However, if the Tribunal is satisfied that it was not reasonably practicable for the claim to be presented in that time, it can still consider the claim provided it is satisfied that it has been presented within a further reasonable period (Section 111(2) of the Employment Rights Act 1996 (the ERA)).

3. The time limit for bringing a claim is extended by section 207B ERA to facilitate the parties engaging in early conciliation (EC) before the claim is presented. The relevant parts of that section read as follows:

> "(2) In this section –
> (a) Day A is the day on which the complainant . . . 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 . . . receives . . . 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."

4. Before presenting a claim to the Tribunal relating to "any matter", a person must provide ACAS with prescribed information about "that matter" (Section 18A(1) of the Employment Tribunals Act 1996 – the ETA). Surprisingly, the information that must be provided does not relate to the content of "that matter"; it is limited to the names and addresses of the prospective Claimant and the prospective Respondent (Section 18A(10) ETA and Rules 2(2) and 3(1) of the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014). There is no requirement to identify the subject matter of the dispute between them or the basis on which a claim might be brought.

5. The prospective parties are not required to undertake any form of substantive conciliation at all. If the conciliation officer considers that settlement is not possible or the prescribed period for conciliation ends without a settlement having been reached, the officer must issue a certificate to that effect (Section 18A(4) ETA). A Claimant cannot present a claim without an EC certificate (section 18A(8) ETA).

6. Anything communicated to a conciliation officer in connection with the performance of her conciliation functions "shall not be admissible in evidence in any proceedings before an employment tribunal, except with the consent of the person who communicated it to that officer" (Section 18(7) ETA).

The issues

7. At the Preliminary Hearing, the parties agreed certain relevant facts. The effective date of termination of Mrs Peacock's employment was 6 April 2018. Mrs Peacock contacted ACAS under the EC procedure twice. The first occasion was on 6 June 2018 and she received the EC certificate on 18 June. The second occasion was on 14 June and she received the EC certificate on 25 June. She presented her claim to the Tribunal on 23 July 2018.

8. If the first EC certificate was the relevant certificate for the purposes of identifying Day B in Section 207B(2)(b) ERA, the time limit for Mrs Peacock to present her claim expired on 18 July and her claim had been presented five days out of time. On the other hand, if the second EC certificate was the relevant certificate, the time limit expired on 25 July and the claim had been presented in time.

9. In Commissioners for HM Revenue and Customs v Garau UKEAT/0348/16, the Employment Appeal Tribunal (EAT) decided that as only one EC certificate is required in order to present a claim "relating to any matter" for the purposes of Section 18A(1) ETA, Day A in Section 207B(2)(a) ERA must refer to the day the Claimant contacted ACAS to start the process that led to that EC certificate being issued under section 18A(4) ETA. And Day B in Section 207B(2)(b) must refer to the date on which that EC certificate was received. Any further EC certificate is not a certificate falling within Section 18A(4) ETA and so cannot extend time.

10. The issues for the Tribunal to decide were therefore as follows:

    10.1 Which certificate was the certificate issued under Section 18A(4) ETA as a result of Mrs Peacock providing ACAS with prescribed information about "the matter" to which her claim related?

    10.2 If the first EC certificate was the relevant certificate, so that the claim had been presented out of time, was it reasonably practicable for Mrs Peacock to have presented the claim in time?

    10.3 If it was not reasonably practicable for Mrs Peacock to have presented the claim in time, had she had presented her claim within a further reasonable period?

The facts

11. The Tribunal heard oral evidence from Mrs Peacock and from Mr Proudfoot, a Director of the Company. On the basis of that evidence, the Tribunal made the following further findings of fact.

12. Mrs Peacock was dismissed by a letter received by her on 6 April 2018. She sought to appeal against her dismissal but the Company told her on 19 April that it would not consider her appeal.

13. When Mrs Peacock contacted ACAS for the first time on 6 June, she sought their help with resolving her claim for outstanding holiday pay. The Company engaged in conciliation about that and ACAS forwarded to Mrs Peacock the Company's draft agreement to settle that matter. Mrs Peacock told the conciliation officer that she was not prepared to sign the agreement, because it included a clause that the proposed sum was in full and final settlement of all her claims against the Company and she had been discussing a claim of unfair dismissal with her union.

14. At the beginning of the Hearing, the Tribunal decided, on Mrs Peacock's application, that an email from Mr Proudfoot to the conciliation officer dated 18 June 2018 was not admissible in evidence. Applying section 18(7) ETA, the email was not admissible because it indicated what Mrs Peacock had said to the conciliation officer during the conciliation process, and she did not consent to that being disclosed. When she gave evidence, however, Mrs Peacock herself said that she had mentioned to the conciliation officer that she was considering an unfair dismissal claim, when explaining to him why she would not accept the draft settlement agreement. In those circumstances, the Tribunal considers it permissible to consider the content of Mr Proudfoot's email, for the purposes only of confirming that the conciliation officer had passed on to Mr Proudfoot what Mrs Peacock had said about a possible unfair dismissal claim: in his email Mr Proudfoot stated that he did not accept that her dismissal had been unfair and the Company would defend the claim. ACAS issued an EC certificate on the same day as Mr Proudfoot's email was sent.

15. Although the EC process had not resulted in a settlement agreement on the holiday pay, the Company accepted that Mrs Peacock was owed it, and paid it in two instalments on 7 and 19 June 2018. Mrs Peacock then viewed that matter as resolved.

16. Mrs Peacock had dealt with the holiday pay issue on her own but she felt the need of assistance from her union to deal with her unfair dismissal claim. She had first discussed her dismissal with the union on 14 or 15 April, that is, around a week after she found out that she had been dismissed. At some point after 6

June but before 14 June, she told the union that she had been in touch with ACAS to try to sort out her holiday pay. She asked her union to help her with a claim of unfair dismissal. The union referred the matter on to its solicitors. The union contacted ACAS under the EC procedure on Mrs Peacock's behalf on 14 June. ACAS issued an EC certificate on 25 June. Mrs Peacock did not tell the union or the solicitors that she had received an EC certificate on 18 June after her earlier contact with ACAS.

17. Mrs Peacock first spoke to the solicitors who were to act for her in relation to her unfair dismissal claim on or around 10 July, on the 'phone. She could not remember whether she told them that she had already been in contact with ACAS about her holiday pay claim. She had more telephone calls with them before her claim was finalised but she could not remember whether she mentioned her earlier contact with ACAS during those calls either.

18. The solicitors submitted a claim form to the Tribunal on Mrs Peacock's behalf on 23 July 2018. The claim was of unfair dismissal only.

The parties' arguments

19. Mrs Peacock argued that the first certificate could not be the relevant certificate for the purposes of extending time under Section 207B. She had contacted ACAS to give it the prescribed information about one "matter" only, namely her holiday pay claim, which was then the subject of conciliation and ended up being settled. She had mentioned her unfair dismissal claim only as an explanation for why she would not sign a settlement agreement on her holiday pay claim in the terms proposed by the Company. She had not asked the conciliation officer to conciliate on it. The second certificate was the relevant certificate because that was the one that had resulted from her union contacting ACAS with the prescribed information about the "matter" of her unfair dismissal claim. She said that the decision in Garau could be distinguished from her case because in Garau both EC certificates related to unfair dismissal and disability discrimination. Mrs Peacock's certificates related to entirely separate matters.

20. The Company argued that, applying the decision in Garau, the second certificate was of no effect in relation to the extension of time. The first certificate was the only one that could be relied upon. The certificate that satisfies the requirement to contact ACAS about "that matter" in Section 18A ETA is the only certificate that can extend time under Section 207B ERA and the Tribunal should apply the case law relating to Section 18A ETA to decide whether Mrs Peacock's first certificate related to "that matter". Case law in cases such as Compass Group UK & Ireland Ltd v Morgan UKEAT/0060/16 had established that "that matter" should be given a broad and non-legalistic interpretation. As a result, even if Mrs Peacock did not mention a possible unfair dismissal claim to ACAS when she

first contacted them, that first process should be viewed as covering that matter. Alternatively, if it was necessary for the subject of her potential claim to be raised during the EC process for the resultant certificate to be the relevant one, Mrs Peacock had raised the possibility of an unfair dismissal with ACAS during the first EC period, albeit that there was no conciliation about it.

Conclusion on the relevant certificate

21. The Tribunal considered the case law on how the word "matter" in section 18A ETA and section 207B ERA should be interpreted.

22. Turning first to the decision in Garau, the Tribunal was unable to distinguish that case from Mrs Peacock's on the basis she suggested. In Garau, the Claimant claimed unfair dismissal and disability discrimination. He contacted ACAS for the first time after he had already been given notice of termination of his employment. He contacted ACAS for the second time after his dismissal had taken effect. The EAT's decision does not mention any findings of fact as to whether Mr Garau raised the same matters with ACAS on both occasions, or indeed whether he identified any specific issues to the conciliation officer at all. It is not possible to know, therefore, whether, as Mrs Peacock argued, both EC certificates related to conciliation on both unfair dismissal and disability discrimination.

23. In Morgan, the EAT had to decide whether an EC certificate could be accepted as satisfying the requirements of section 18A ETA when the claim included the Claimant's dismissal but the EC certificate was issued before the dismissal took effect. The EAT said that, provided there are or were "matters between the parties" whose names and addresses were notified and those matters related to the claim that was being brought, that was sufficient for the EC certificate to allow the claim. The "matter" did not need to be defined by reference to the state of affairs at the date the process began or the certificate was issued. The EAT acknowledged that its approach might mean that claims could be made about matters that had never been the subject of conciliation, but said: "We do not regard the fact that claimants might bring claims about which EC has not been conducted as significant in circumstances where there is no obligation to undertake any EC at all and certainly no obligation to undertake EC in relation to any particular claim."

24. The EAT also said: "That does not mean that an EC certificate affords a prospective claimant a free pass to bring proceedings about any unrelated matter; it does not. In our judgment, it will be a question of fact and degree in every case where there is a challenge . . . to be determined by good common sense of tribunals whether proceedings instituted by an individual are proceedings relating to any matter in respect of which the individual has provided

the requisite information to ACAS." The EAT also said: "In most cases, the parties will know what facts or matters were in issue between them."

25. In this Tribunal's view, these comments of the EAT in Morgan indicate that the word "matter" in section 18A ETA and section 207B ERA may on occasion need to be decided on evidence by a Tribunal. It cannot be defined by reference to what the Claimant has said to the conciliation officer about the dispute, since the Claimant need not tell the conciliation officer anything about that. Nor can it be defined by reference to what became the subject of actual conciliation, since no conciliation need take place. The Tribunal concluded that it must mean the facts or matters that were in issue between the parties at the time of the conciliation process (and facts or matters that arose later if they were connected with those facts or matters).

26. Applying this interpretation of the legislation to Mrs Peacock's case, the Tribunal was satisfied that the facts and matters in issue between the parties at the time of the first EC process included not only her outstanding holiday pay but also her dismissal. Mrs Peacock had already challenged her dismissal, by lodging an appeal. Further, she had told ACAS that she was discussing an unfair dismissal claim with her union and the conciliator had passed that information on to the Company. The claim she later presented to the Tribunal related to that matter.

27. For these reasons, the Tribunal concluded that the first EC certificate was the one issued under Section 18A(4) ETA and the only one that could extend time for Mrs Peacock's claim under section 207B ERA. That meant that the claim should have been presented by 18 July and it was presented five days out of time.

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Reasonable practicability

28. The next issue for the Tribunal was whether it was reasonably practicable for Mrs Peacock to present her claim by 18 July.

29. Whether it is reasonably practicable for a claim to be presented within the three-month time limit is a question of fact that depends upon the circumstances surrounding the timing of the claim. The appeal courts have confirmed that the onus is on the Claimant to show that it was not reasonably feasible to present the claim in time (Porter v Bandridge Ltd (1978) ICR 943, Palmer and another v Southend-on-Sea Borough Council (1984) ICR 372).

30. A Claimant may be late in bringing her claim because she was not aware of the time limit. The appeal courts have accepted that that may make it not reasonably practicable for her to have presented her claim in time, *but only if* her ignorance of the time limit was itself reasonable (Walls Meat Co Ltd v Khan [1978] IRLR 499). If she was unaware because her professional advisers had not given her

the information they should reasonably in all the circumstances have given her, then she cannot argue that it was not reasonably practicable for her to present her claim in time. If an employee takes advice about her rights and is given incorrect or inadequate advice, the employee cannot rely upon that fact to excuse a failure to bring a claim to the Tribunal in time: the adviser's fault is attributed to the employee (Marks & Spencer plc v Williams-Ryan [2005] IRLR 562). This principle covers advice given to the employee by her union (Times Newspapers Ltd v O'Regan [1977] IRLR 101).

31. Within a few days of being dismissed in April, Mrs Peacock obtained advice from her union about her dismissal and the possibility of appealing against it. At some point in the second week of June, she mentioned to her union that she had contacted ACAS about her notice pay. There was no evidence before the Tribunal on whether the union passed that information on to the solicitors, but it could reasonably have been expected to. Both the union and the solicitors should reasonably have been aware that, if an EC certificate was issued as a result of Mrs Peacock's earlier contact with ACAS, that might be relevant to the time limit for presenting her claim of unfair dismissal, particularly since both sets of advisors knew that Mrs Peacock had taken issue with the Respondent about her dismissal. Either or both advisors could reasonably have been expected to ask Mrs Peacock whether she had received an EC certificate in relation to that earlier contact. The union had an opportunity to discuss this when she first mentioned her contact with ACAS to them, in the second week in June. The solicitors could have raised it when she first discussed her case directly with them in the second week of July. Had she been asked those questions, Mrs Peacock would have let her advisors know about the EC certificate that she received on 18 June.

32. Even if the correct approach to identifying the relevant EC certificate was that advanced by Mrs Peacock at the Preliminary Hearing (that is, that the relevant EC certificate was the one that followed the Claimant approaching ACAS for conciliation about the subject matter of the claim), the advisors should reasonably have asked Mrs Peacock whether she had mentioned an unfair dismissal claim to ACAS, and she would have confirmed that she did.

33. Once they knew about the existence of the earlier EC certificate and that Mrs Peacock had mentioned a possible unfair dismissal claim to ACAS, the advisors should reasonably have assumed that the first EC certificate might be the relevant one for time limit purposes. Had they made that reasonable assumption, they would have acted on the basis that the claim needed to be presented by 18 July. Had they done so, it would have been reasonably practicable for the claim to have been presented by that date.

34. For those reasons, the Tribunal concluded that it was reasonably practicable for the claim to have been presented in time.

Conclusion

35. As the claim was not presented within the relevant time limit and the Tribunal was satisfied that it was reasonably practicable for it to have been presented within that time, the claim was dismissed because the Tribunal had no jurisdiction to consider it.

Employment Judge Cox
Date: 9 January 2019