EMPLOYMENT TRIBUNALS

Claimant: Mr G Fletcher

Respondent: Nexperia (UK) Ltd

Heard at: Manchester (by CVP) **On:** 18 December 2020

Before: Employment Judge Phil Allen
(sitting alone)

REPRESENTATION:

Claimant: Mr P Gorasia, Counsel
Respondent: Ms R Urmston, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The Tribunal will not set aside or vary Employment Judge Parkin's decision recorded in the letter of 22 May 2020 to reconsider his rejection of the claim (2405355/2020) under rule 13 and to accept that claim. That decision was correctly made, in accordance with rule 13.

2. The claims brought by the claimant (2405355/20 and 2413585/20) were not brought within the period required by section 111 of the Employment Rights Act 1996 and/or regulation 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994, and it was reasonably practicable for the complaints to have been entered in time.

3. The Tribunal does not have jurisdiction to consider any of the claims brought and they are dismissed.

REASONS

Introduction

1. The claimant was employed by the respondent as a Production Manager from 25 July 2011 until 16 December 2019. Following his dismissal, the claimant brought claims for unfair dismissal and for breach of contract (in respect of notice).

2. The preliminary hearing was arranged to determine whether the claims should be permitted to proceed, on the basis that the respondent contended that the claims had not been entered within the time required.

Claims and Issues

3. The issue to be determined at the preliminary hearing was whether or not the Tribunal had jurisdiction to consider the claimant's claims, as the respondent submitted that they had been entered out of time.

4. At the start of the preliminary hearing it was confirmed and agreed by both parties that the Tribunal would consider this issue in respect of both claims, that is 2405355/20 and 2413585/20.

5. The respondent also contended that Employment Judge Parkin had been wrong to reconsider his rejection of claim (2405355/20) and to accept the claim (2405355/20) as having been received on 13 May 2020. The Tribunal confirmed to the parties that this application was considered to be one made under rule 29, in which the respondent sought to vary or set aside an earlier case management Order. It was agreed that this issue would also be determined at the preliminary hearing.

Procedure

6. The claimant was represented by Mr P Gorasia, counsel. The respondent was represented by Ms R Urmston, solicitor.

7. The hearing was conducted by CVP remote video technology. Both parties and the witness attended the hearing remotely. It was a public hearing.

8. An agreed bundle of documents was prepared in advance of the hearing. The bundle ran to 123 pages. The Tribunal had read the content of the bundle in advance of the hearing, albeit it was highlighted to the representatives that if there were any particular passages or sections they wished to emphasise, they should highlight them to the Tribunal (particularly with regard to the Regulations which were included in the bundle).

9. The bundle included a witness statement which had been prepared by Ms A Paxton, Partner at Analysis Legal LLP, the claimant's solicitors. Ms Paxton had signed the witness statement on 11 December 2020. The Tribunal heard evidence from Ms Paxton, who was cross examined by the respondent's representative.

10. Once the evidence was heard, each of the parties was given the opportunity to make submissions. The claimant's representative provided written submissions, which had not been read in advance by the Tribunal. When giving his oral submissions he referred to those written submissions, as well as referring to two authorities. The respondent's representative made oral submissions and referred to a small bundle of authorities which had been prepared on the respondent's behalf in advance of the hearing.

11. After the submissions were made, the Tribunal adjourned to consider its decision. The Tribunal returned and delivered its judgment orally to the parties as recorded above. However, as there was insufficient time available, the Tribunal did not give its reasons at the same time as delivering its judgment and accordingly it provides the reasons outlined below.

Facts

12. The claimant was dismissed by the respondent on 16 December 2019. The claimant instructed his solicitors to act for him in January 2020. The claimant entered into ACAS early conciliation on 9 March 2020 and the ACAS early conciliation certificate was issued on 9 April 2020. Accordingly, it was common ground that the claim form needed to be entered at the Employment Tribunal by 9 May 2020, in order for the claimant's claims to have been entered within the primary time limits.

13. On 6 May 2020 the claimant's first claim (2405355/20) was lodged by a solicitor employed by the claimant's solicitors' firm. The claim form stated that the claimant's early conciliation number was R122630/20/77. In fact, the ACAS early conciliation certificate for the claimant was R126630/20/77. In other words, instead of including two sixes in the middle of the number, the claimant's solicitor had included two twos. It was not in dispute that the number was incorrect.

14. It was identified, on the day of entering the claim, that a first version of the claim form included an incorrect date of birth for the claimant, and accordingly a second copy of the claim form was entered with the date of birth corrected (but not the ACAS early conciliation certificate number corrected, as that error had not been identified).

15. The claimant's solicitors' normal practice is that they would print out the draft Tribunal claim form and the ACAS early conciliation certificate, in order to check the number(s) more easily. On this occasion that was not possible, because the solicitor who lodged the claim was working remotely at her parent's house due to COVID-19 and she did not have the physical file, or a printer. This made checking the ACAS number more difficult, as she needed to move between documents on her computer screen. Ms Paxton also believed that she checked the claim form herself shortly after it had been lodged, but she did not identify the error in the ACAS early conciliation number, which she described as being *"easy to overlook".*

16. On 13 May 2020 Regional Employment Judge Parkin rejected the claim form because it did not contain a valid early conciliation number. Within an hour and on the same date, Ms Paxton emailed the Employment Tribunal providing details of the correct ACAS early conciliation certificate number and a copy of the ACAS early

conciliation certificate. She applied for the decision to reject to be reviewed. She copied her email to the respondent's solicitors.

17. On 20 May 2020 the respondent's solicitors sent an email to the Tribunal objecting to the claimant's application and contending that the defect had not in fact been rectified (as, in summary, the form had not been re-submitted with the correct ACAS Early Conciliation number recorded in the form itself). The respondent also contended that the claim had been entered out of time.

18. On 22 May 2020 the Tribunal wrote to the claimant's solicitors explaining that the claim had now been accepted after reconsideration by Employment Judge Parkin. That stated:

> *"Because the original decision to reject the claim was correct but the defect which led to the rejection has since been rectified, the claim form is to be treated as having been received on 13 May 2020."*

19. The respondent subsequently entered a response, maintaining its objections both to the fact that the defect had not in fact been rectified and their contention that the claim was out of time. As, in accordance with rule 13, the claim had been accepted with effect from the date when the error had been rectified, the claim was presented only on 13 May 2020, that is after the deadline of 9 May had expired.

20. On 3 September 2020 the claimant submitted a second claim (2413585/2020) which was identical to the original claim, save that it included (on the face of the Form) the correct ACAS early conciliation number. That claim was entered in order to protect the claimant's position in the light of the respondent's ongoing arguments/objections.

The Law

21. The starting point is the wording of section 111 of the Employment Rights Act 1996. Section 111 (2) provides:

> *(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.*

22. The period is, of course, extended by any period of ACAS Early Conciliation.

23. The wording which applies to the time limit for bringing a breach of contract claim for notice under Regulation 7 of the Industrial Tribunals Extension of

Jurisdiction (England and Wales) Order 1994 is identical to that under S.111(2) ERA 1996.

24. Whether it was not reasonably practicable for the claim to be entered in time, is a question of fact for the Tribunal to decide.

25. Key to the question is why the primary time limit was missed.

26. The Tribunal must apply the words of the statute, that is whether it was not reasonably practicable. That does not mean: whether it was physically possible; or (simply) reasonable. Asking whether it was reasonably feasible to present the claim in time, is an alternative way of expressing the test.

27. The claimant relied upon or referred to: *North East London NHS Foundation Trust v Zhou* UKEAT/66/18; and *Dedman v British Building and Engineering Appliances Ltd* [1973] IRLR 379. The respondent also relied upon or referred to *Zhou* and *Dedman*, as well as *Tesco Stores Limited v Kayani* UKEAT/128/16. In addition, in verbal submissions, the respondent's representative referred to *E.ON Control Solutions Ltd v Caspall* [2020] ICR 552.

28. The claimant, in particular, placed emphasis on the following paragraphs of *Dedman* which say:

> *"In my opinion the words 'not practicable' should be given a liberal interpretation in favour of the man. My reason is because a strict construction would give rise to much injustice which Parliament cannot have intended."*
>
> *"Summing up, I would suggest that in every case the Tribunal should inquire into the circumstances and ask themselves whether the man or his advisers were at fault in allowing the* [time limit] *to pass by without presenting the complaint. If he was not at fault, nor his advisers - so that he had just cause or excuse for not presenting his complaint within the* [time limit] *- then it was 'not practicable' for him to present it within that time. The Court has then a discretion to allow it to be presented out of time, if it thinks it right to do so…"*

29. The Judgment in *Dedman* also said the following (albeit the claimant's representative emphasised his view that this must be considered in the context of that case):

> "*But what is the position if he goes to skilled advisers and they make a mistake? The English court has taken the view that the man must abide by their mistake."*

30. The Tribunal has very carefully considered the Judgment in *Zhou* which is a case which the Tribunal has found the most helpful when considering the issues in this claim and, indeed, was an authority upon which both parties relied. The Tribunal has considered the entire Judgment, but will reproduce in this Judgment some of the key sections of that Judgment which it has taken into account. At paragraph 30, the EAT said:

"Rule 12 of the ET Rules 2013, deals with rejection for substantive defects and allows that in certain prescribed circumstances, an Employment Judge might allow that the claim should not be rejected; see Rule 12(2A) and (1)(e) or (f). As was observed in Adams v BT plc [2017] ICR 382, the consequence of this provision is that Rule 12(2A) provides an escape route for minor errors in relation to a name or address both identified as the mandatory minimum information to be supplied under Rule 10 (failing which an ET will reject the claim). Contrariwise, however, a minor error in relation to the earlier EC certificate number itself - if the EC number entered on the claim form was not the same as the EC number on the certificate - is not capable of being corrected in the same way under Rule 12(2A). As Simler P opined in Adams (see paragraph 7), "It is difficult to see any justification for this distinction"".

31. At Paragraph 35 (of *Zhou*) it said:

"Thus the course that a Claimant must take in these circumstances is to re-present her claim with the relevant error rectified. If that is still within the relevant time period, that creates no difficulty. If, however, the original claim was lodged in time but time expires before the rectified claim is presented, then the question becomes - for the purpose of an unfair dismissal claim, for example (a different test may arise in other claims, e.g. those involving complaints of discrimination) - whether it had been reasonably practicable for the claim to be presented in time."

32. At paragraph 37, the EAT stated:

"As for the approach to be adopted to the question of reasonable practicability, it is trite law that the question of what is or is not reasonably practicable is a question of fact for the ET, a test that was considered in Wall's Meat Co Ltd v Khan [1979] ICR 52 CA by Brandon LJ in the following terms:

"… 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 circumstance 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."'"

33. At paragraph 40 it said:

"As the Claimant has stressed, it is trite law that the question of what is or is not reasonably practicable is a question of fact for the ET, see Wall's Meat v Khan and also Palmers & Saunders v Southend-on-Sea Borough Council. In this case, correctly focusing on the Claimant's state of mind, viewed objectively, the ET held that she believed that she had lodged a properly constituted claim in time because she had confidence in her professional advisers. If those advisers had unreasonably failed to lodge a properly constituted claim in time, however, then the application of the Dedman principle must mean that the Claimant would not be entitled to simply rely on that confidence in what they had done; she would be bound by their unreasonable conduct. The question therefore became whether the Claimant's solicitors had acted reasonably. They had plainly failed to spot the error on the ET1 and the ET found that they were unquestionably at fault in failing to check the ET1 thoroughly. It did not conclude, however, that this automatically meant that their conduct was unreasonable."

34. At paragraph 44, the EAT said:

"For all that, I also agree with the Claimant that it is hard to characterise the error in question as anything other than minor and technical and I do not consider it could be said that this kind of mistake was anticipated by the earlier case law (such as Wall's Meat or Dedman); those cases plainly did not address the kind of additional requirements now imposed under the EC regime. And in this context, I consider the ET was entitled to make the observation that fault does not necessarily equal unreasonableness for these purposes. It seems to me that the particular nature of the error might, in particular cases, be a relevant factor for an ET to weigh in the balance when determining the reasonableness of the conduct for the purposes of reasonable practicability…"

35. At paragraph 45, the EAT said:

"In circumstances in which it might not have been unreasonable for a Claimant or, I would allow, her advisers not to appreciate that an initial claim lodged in time contained a minor but a fatal error, an ET would be entitled to find it was not reasonably practicable for the corrected claim form to be presented in time. This question will inevitably be fact- and context-specific but, as Lady Wise allowed in Baisley, it might not always be right to assume that every omission, however technical, is not reasonable."

36. At paragraph 49 the EAT said:

"That said, I do not agree with the Respondent that the answer to this question was, or is, inevitable. Although the ET was critical of the Claimant's solicitors for not checking the ET1 thoroughly, it allowed that this was not necessarily unreasonable. That was neither an error of approach, nor did it evidence a perverse conclusion, given the particular circumstances of the case. The Claimant had expressly unbundled the services that were to be provided by her solicitors to save costs; not an unreasonable step to take. In addition, she had undertaken to complete the formal parts of the ET1 herself. That being so, if the

solicitors checked everything she had done, there would have been no saving in cost. Their error might thus not have been unreasonable in those circumstances. The Respondent objects that all the solicitors needed to do was check those matters that were mandatory requirements for the valid presentation of the claim. That might be a relevant point but I do not consider it can be said to be determinative; ultimately, it would be a matter of weight and balance for the ET."

37. The respondent placed emphasis on paragraph 28 of the Judgment in *Kayani*, which said (in relation to the Tribunal's Judgment in that case):

"This approach was flawed for three reasons. First, there is ample authority to support the contention that, far from being a technical matter, compliance with the rules on early conciliation is an essential requirement of a claim, and there is no discretion to avoid the consequences of a failure to comply (Sterling and Cranwell). Secondly, there is no attempt to consider the reasonableness or otherwise of taking three months to remedy the initial failure to comply with those requirements in the application of 2 June 2015. Thirdly, the adequacy or otherwise of the solicitors' actions during this period are not commented on at all. There was unchallenged evidence about this, which was a material consideration ignored by the Judge."

38. The Tribunal also referred the parties to Underhill LJ's guidance in *Lowri Beck Services Ltd v Patrick Brophy* [2019] EWCA Civ 2490 at paragraph 12 where he summarises the essential points in the correct approach to the test of reasonable practicability as follows:

(1) The test should be given a liberal interpretation in favour of the employee (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).

(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119. (I am bound to say that the reference to "feasibility" does not seem to me to be a particularly apt way of making the point that the test is not concerned only with physical impracticability, but I mention it because the Employment Judge uses it in a passage of her Reasons to which I will be coming.)

(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman). I make that point not because there is any suggestion in this case that the Claimant's brother was a skilled adviser but, again, because the point is referred to by the Employment Judge.

(5) The test of reasonable practicability is one of fact and not of law (Palmer)."

39. In respect of the Employment Tribunal Rules, rule 13 provides:

"A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either –

(a) The decision to reject was wrong; or

(b) The notified defect can be rectified."

40. The rule also goes on to say (13(4)):

"If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified."

Conclusions – applying the law to the facts

41. As a result of the fact that the original claim was rejected, the first claim was presented out of time, being four days after the date upon which it was required to be entered. The second claim was presented just under four months later, also outside the primary time limit for both of the claims pursued (and well outside that time limit).

42. The claimant's representative highlighted that the error in entering the ACAS EC number on the claim form had occurred during the initial lockdown following COVID-19. This was a time which entailed significant upheaval for everyone and, in this case, had meant that usual working patterns had ceased to be possible and needed to be adapted. What was also argued was that mistakes can and do occur in the work of legal representatives and, in this case, the error was: of a minor nature (with disproportionate effect); was not done intentionally; and was one which might be made by any practitioner (irrespective of seniority). The Tribunal entirely agrees with these submissions.

43. Applying the legal provisions and the case law outlined above, the question for the Tribunal was whether it was reasonably practicable for the claim to have been entered in time. The Tribunal considered all of the authorities referred to. The Tribunal, in particular, started with LJ Underhill's guidance in *Lowri Beck Services* as detailed above and the points listed. He emphasised that the test should be given a liberal interpretation in favour of the employee. He also emphasised that if an employee retained a skilled adviser, any unreasonable mistake on the part of the adviser is attributed to the employee. This is, of course, what was said in the case of *Dedman*, albeit in different circumstances as in *Dedman* that was an error about the

date upon which a claim was required to be entered as opposed to an error in the way in which the claim was entered.

44. Both parties placed particular emphasis on the case of ***Zhou***, each relying on different paragraphs which is why they have been reproduced in the legal section above. That decision is clearly authority for the fact that an error by an adviser, will not always mean that it was reasonably practicable for the claim to have been entered in time. However, it is notable that the circumstances in ***Zhou*** involved an adviser from whom the claimant had only sought certain services. That is, that the services provided had been unbundled to save costs, so that the claimant herself entered the claim and not the solicitors.

45. In considering whether it was reasonably practicable for the claim to be entered in this case, the Tribunal has taken particular notice of paragraph 49 of ***Zhou*** as reproduced above. In that paragraph, HHJ Eady QC explained why she did not believe that the only outcome in that case was that it was reasonably practicable for the claim to have been entered in time. Her explanation, in the circumstances of that case, placed particular emphasis on the unbundling of services and the fact that the solicitors were not engaged to check and/or enter the Tribunal claim in the circumstances of that case.

46. The claimant's solicitor in particular referred to the fact that the cases appear to distinguish between a mistake that was unreasonable and one that was not. The claimant's representative submitted that the mistake made in the ACAS EC number was not unreasonable in the circumstances of this case (and in the circumstances of the early days of the COVID outbreak).

47. Having considered both submissions and the authorities referred to, the Tribunal's conclusion is that it was reasonably practicable for the claims to have been entered within time. As outlined above, the Tribunal accepts that this was an unintentional mistake which could have been made by any practitioner, but nonetheless it was a mistake. The type of circumstances addressed in ***Zhou*** where services were unbundled (emphasised by HHJ Eady QC in her paragraph 49) do not exist in this case. Even if the claimant's representative's contention regarding the difference between a reasonable and unreasonable mistake is accepted, the mistake made in this case is not one which in the Tribunal's view can genuinely be described as a reasonable one (whilst acknowledging that it is one which could be made).

48. Considering and applying the words of the Act (and the Order) the claim could have been entered in time and it was reasonably practicable for the claimant to have done so. It was also in the Tribunal's view, using the alternative terminology suggested, reasonably feasible for the claim to have been entered in time.

49. The claimant's representative in his submissions made reference to the Employment Tribunals (Constitution and Rules of Procedure) (Early Conciliation: Exemptions and Rules of Procedure) (Amendment) Regulations 2020 which came into force on 1 December 2020 (in relation the elements relevant to this claim) and which provide the Tribunal with a discretion to accept claims where: the early conciliation number on the claim form is not the same as the early conciliation number on the certificate; and it would not be in the interests of justice to reject the claim. He accepted that the amended rules did not apply at the time that the facts in

this case occurred. He, however, submitted that it showed the difficulty in justifying the draconian nature of the application of the relevant rule, as was commented upon by HHJ Simler as referred to in paragraph 30 of the ***Zhou*** decision. The Tribunal agrees that the change in the law appears to be a sensible one and, had it applied at the time, it might have averted the issues arising in this claim. However, the law as it stood at the time required the ACAS early conciliation certificate number on the claim form to match that which appeared on the certificate, therefore the fact that the law has subsequently been changed does not assist the claimant. Indeed, if anything, it illustrates that, applying the law that was in force at the time, it was reasonably practicable for the claim to be entered, and it should not be found that it was not reasonably practicable simply because an error was made. This paragraph is provided by way of response to the submission made and was not a central part of the Tribunal's decision that it was reasonably practicable to submit the claim in time.

50. On the basis of the decision made, it is not necessary for the Tribunal to go on and consider whether the claim was subsequently submitted within a reasonable period. However, the Tribunal would add that, taking account of the speed with which the claimant's solicitors rectified the defect after it was identified to them, it is clear that had this been an issue the first claim would have been found to have been submitted within a further reasonable period. However, for the second claim, it is unlikely that would have been the decision reached.

The respondent's application

51. As a result of the primary finding, the Tribunal's decision on the respondent's application has no practical importance. However, the Tribunal does find that EJ Parkin's acceptance of the claim with effect from 13 May 2020 on the basis that the defect had been rectified, was entirely correct and is not something which the Tribunal will vary or set aside.

52. It is often the case that claims (and indeed responses) are submitted to the Tribunal consisting of more than one document. Indeed, it is often the case in a multiple claim that the contact details for some of the claimants and their ACAS early conciliation certificate numbers are included in a document appended to and/or different from the claim form itself. The Tribunal accepts that when the defect was rectified, the claimant's claim effectively was accepted on the basis that it was made up of the claim form itself, the grounds of claim, and the solicitor's email of 13 May which included the correct ACAS early conciliation number. Indeed, the resubmitted claim also included the attached ACAS early conciliation certificate which did, of course, include the correct number. On that basis, at the time of EJ Parkin's reconsideration decision, the claim submitted (including all appendices) included all of the information required and it was entirely appropriate and correct for EJ Parkin to have accepted that the defect was rectified.

53. The Tribunal also finds that the text of rule 13 does not require an amended and resubmitted form which entirely complies with all of the preceding rules within the form itself. If that was the case the rule could be more straightforwardly written to say so and, arguably, rule 13 would not be required at all (or in any event would not need to be written in the terms that it is). The requirement uses the broader wording that the defect in the original claim form must be rectified, and this wording

clearly envisages that a party is able to rectify the defect without simply resubmitting a claim form in which all of the defects had been rectified on the face of the form.

54. The claimant's solicitor also submitted that, in any event, it would not be in the interests of justice to vary or set aside the decision which had previously been made (under the wording of rule 29), which is something with which the Tribunal also agrees, but is not the reason for the decision reached.

Conclusion

55. As confirmed above, both claims forms were entered out of time. Accordingly, the Tribunal does not have jurisdiction to consider any of the claimant's claims and they are all dismissed.

Employment Judge Phil Allen

11 January 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
15 January 2021

FOR THE TRIBUNAL OFFICE