Appeal No. UKEAT/0439/14/DM
UKEAT/0440/14/DM

EMPLOYMENT APPEAL TRIBUNAL

FLEETBANK HOUSE, 2-6 SALISBURY SQUARE, LONDON EC4Y 8AE

At the Tribunal
On 18 February 2015

Before

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

(SITTING ALONE)

MRS M STERLING — APPELLANT

UNITED LEARNING TRUST — RESPONDENT

Transcript of Proceedings

JUDGMENT

APPEARANCES

For the Appellant	MRS MORELINE STERLING (The Appellant in Person)
For the Respondent	MR MARTIN BLOOM (Solicitor) Hegarty LLP Solicitors 48 Broadway Peterborough Cambridgeshire PE1 1YW

SUMMARY

JURISDICTIONAL POINTS

JURISDICTIONAL POINTS - Extension of time: reasonably practicable

PRACTICE AND PROCEDURE - Time for appealing

The Claimant submitted a claim form, fee, and application for remission to an Employment Tribunal office four days before time expired. It was returned to her as rejected, mis-addressed by omission of her house number, at a time when it could not be re-submitted without being out of time, though the Claimant submitted it at the first opportunity. The Judge inferred from her evidence and the material before him that she had not fully entered the ACAS conciliation number she had been given on her application form, and that the Employment Tribunal had been obliged by Rule 10(1)(c)(i) of the **Employment Tribunal Rules** to reject it. No argument was made that it had not been reasonably practicable to submit the claim on time. An appeal on grounds that the Employment Judge should not have drawn the inference he did, and that he had failed to hold it not reasonably practicable to submit the claim in time, was rejected - the former was a permissible conclusion, the second had not been argued before him but in any event he also dealt with the question and concluded that the reason for being out of time was the failure of the Claimant to record the ACAS number fully and correctly, a conclusion he was entitled to reach.

THE HONOURABLE MR JUSTICE LANGSTAFF (PRESIDENT)

1. On 5 November 2014 Employment Judge Emerton, at London (South), held that the Tribunal had no jurisdiction to consider a number of complaints which the Claimant had made. Her complaints that she had been unfairly dismissed, automatically unfairly dismissed and that her former employer had been in breach of contract by failing to pay her notice pay, were held to be out of time and thus that the Tribunal had no jurisdiction to consider them. She also claimed that she had been discriminated against because of disability and indeed one of the acts of which she complained was her dismissal. Time for making that claim was extended.

2. The circumstances in which the Judge came to hold that the Claimant was out of time are, to say the least, unfortunate. It is difficult to avoid a feeling of sympathy for the position in which the Claimant was and is in respect of her claim.

3. Before I turn to the facts, however, I should say a word about the nature of the appeal jurisdiction. For a decision to be upset on appeal, it has to be shown that the Judge made a mistake in law. It is very rare for a mistake of fact to amount to a mistake of law. In general, on appeal, the facts as found by the Judge are to be accepted. Moreover, a Judge can only decide a case on the basis of the material before the Judge at the time. If material comes to light later, that cannot mean that his decision is wrong in law. Similarly he can only decide a case on the basis of the arguments put before him. In this case, as will be seen, many of the arguments put forward by the Claimant to the Tribunal were advanced by a Mr McKenzie. He was not a qualified lawyer. I understand he came from a legal advice centre.

4. The Claimant is fiercely critical of the way in which he presented her case, which in her view amounted to him effectively conceding that her claim was indeed out of time and that the relevant claims could not sensibly be extended because there would be no power to do so, rather than making the available arguments about them.

The Facts

5. The period of time provided for by the **Employment Tribunal Rules** began after dismissal on 20 February 2014. Allowing for a reference to ACAS for early conciliation, the last date by which the claim had to be presented was 5 July 2014. That was a Saturday. On 1 July, therefore the Tuesday before (the Judge described it as Monday at one point in his Judgment but wrongly), the Claimant submitted an application to the Tribunal. That was accompanied with a £250 fee, as was appropriate, and an application for fee remission. If she was entitled to remission, some or all of the £250 would be repaid in due course.

6. The fact that a form had been submitted on that date became apparent to the Judge when at the start of the hearing Mr McKenzie produced for the first time a stamped copy of the application. It bore on it three stamps: 1 July, 7 July and 9 July. The Judge concluded that what had happened was that the form on 1 July was sent by the Tribunal Office at which it had been submitted to Leicester. He decided that the office in Leicester had returned the form. It did so, accompanying it with a letter dated 3 July. As it happens the letter was mis-addressed. It was sent neither to the Claimant's representative, though that was the address indicated on the form as that to which there should be correspondence, nor was it sent to her home by house number. It was sent to her at her street. Accordingly, when it arrived, and it is impossible to know whether it would have been on the Friday or the Saturday, it went to a neighbour. It only

subsequently arrived at the Claimant's home. When it did, she went to the Tribunal Office again at the first opportunity on the Monday.

7. The Tribunal, in its central paragraph finding facts, said this (paragraph 8):

> **"The tribunal heard oral evidence from the Claimant to deal with the circumstances of the claim being brought to the employment tribunal in Croydon. She described how, having taken legal advice, she brought the original claim form and supporting documentations into Croydon employment tribunals on 1 July 2014. She spoke to a member of staff and also provided a fee cheque and a remission application. She had previously received an ACAS Conciliation number and recalled that she had written a number on the claim form in the appropriate box at section 2.3. She did not recall if this number was complete at the time, and had not brought the letter from Leicester returning paperwork to her. She believed that the letter she had received was something about not putting the correct ACAS number on paperwork, and that she had to add two digits to the paperwork to correct it. She could not recall whether the paperwork in question was her claim form, her application for fee remission, or both. She was able to explain that she thought that the letter to her was incorrectly addressed, and certainly it was not delivered to her door by the Royal Mail. The letter in fact appeared to have been received and opened by a neighbour, who left the papers on her door mat. She either found them on the doormat on the Sunday (5 July 2014) after church [it must be 6 July], or alternatively first thing on the Monday (7 July 2014), well before the [Royal Mail] delivery. She could not remember which. Her reaction was to fill in the missing digits on whatever paperwork it was she had, and take that paperwork straight away to the employment tribunal in Croydon on the morning of Monday, 7 July 2014."**

8. The claim was thus regarded by the Tribunal Service as received on 7 July 2014. At paragraph 10 the Tribunal added:

> **"10. The tribunal found the Claimant's oral evidence to be generally clear and plausible, whilst noting that she was however unclear as to exactly what correspondence she had received from Leicester, and which documents needed amendments.**
>
> **11. The tribunal considers, on a balance of probabilities, that had the original claim form contained the correct information in respect of the ACAS conciliation number, it would not have been sent back to her. It follows that the Claimant must (on balance) have re-presented her claim form on Monday, 7 July 2014, containing the full ACAS number. The tribunal also considers, on balance, that the tribunal's computer system, and the "date received" box would have reflected presentation on Tuesday, 1 July 2014, had the form been correctly completed with the mandatory information. It should [be] noted that a cheque in the appropriate amount had been provided, so the claim form would not have been refused for that reason. Had the claim form been correct, there would of course have been no need to return it to the Claimant, and no need for the claimant to bring it in to the tribunal offices again on 7 July 2014.**
>
> **12. The Tribunal's findings of fact on a balance of probability is that although the Claimant had correctly been through the ACAS procedures, the ET1 claim form as originally submitted did not contain a valid ACAS early conciliation number, which is required under Rule 10 (1)(c)(i) of the 2013 Rules of Procedure. …"**

9. The reference to the rule is reference to a rule which in its present form has existed only since the introduction of early conciliation. Rule 10 provides, so far as material, as follows:

> **"10. Rejection: form not used or failure to supply minimum information**
>
> **(1) The Tribunal shall reject a claim if -**
>
> **…**
>
> **(c) it does not contain all of the following information -**
>
> **(i) an early conciliation number;**
>
> **…"**

10. Thus, if the "minimum information" referred to in the heading of the rule is not present on the form, the Tribunal has no option but to reject the claim unless, that is, it might be excused by considering some other rule. Rule 10(2) provides:

> **"The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection."**

11. It is thus envisaged by the rule that an application for reconsideration of the rejection can be made. It might be thought that in any case in which there had been a minor slip which was later corrected on resubmission of the same form, a reconsideration of the rejection might be applicable with the consequence that the claim would not be regarded as having been out of time. That, however, is not for determination by me today. I have heard no developed argument upon it. The reason why it is not for determination before me today is that the Judge raised with the parties the possibility that the Claimant might apply for reconsideration of the rejection of the original claim. But Mr McKenzie, the Claimant's representative, did not take the Judge up on that suggestion and made no such application. There having been no application made to the Judge, I can consider that point no further.

12. The Claimant, through Mr McKenzie, did not ask for an adjournment of the hearing to provide further information, at least so far as the Judge records it, did not argue to the Judge through Mr McKenzie that the claim had been brought in time, did not ask for reconsideration

of the rejection, and it appears from paragraph 24 that by the time closing submissions at any rate were reached, Mr McKenzie accepted that the Claimant could not show it was not reasonably practicable for her to have presented the claim by the due date.

13. It is obvious that the Claimant was discomfited in part by the way Mr McKenzie appeared to her to be putting her case. He is recorded as having said at paragraph 17 that he had to accept that it would have been reasonably practicable that the claim should be presented by 5 July 2014, but notes at the very next paragraph, 18, that it was at that point that the Claimant herself wished to raise some matters directly with the Judge. They are set out, and do not directly deal with the question of reasonable practicability, though make the point that the Claimant, so far as she was concerned, had done everything of her that it was requisite of her to do and was not herself at fault in the late submission of the claim, as Mr McKenzie was now saying it was.

14. The conclusion which the Tribunal reached is set out at paragraph 24 in these terms:

> **"24. The tribunal has concluded, on the balance of probabilities (as indicated above), that the claims were presented two days out of time. One must have sympathy with the Claimant's apparently inadvertent error when she initially sought to present the claim, which she acted swiftly to remedy once she became aware. However, Mr McKenzie has not pursued any argument suggesting that it was not reasonably practicable for her to present it by the due date, and furthermore the Tribunal considers that even if she did make enquires with tribunal staff (whose identities and roles have not been specified), they were under no duty to carry out an investigation as to current state of her application. It was her own responsibility to check it before presentation. It was an unfortunate error on her part, but it cannot be said that it was not reasonably practicable for her not to have made the error and therefore validly to have presented a claim form before 5 July 2014, rather than presenting a defective form which had to be rejected.**
>
> **25. As Mr McKenzie has not suggested that there was any material delay in the Claimant being notified of the rejection, the tribunal has not considered the point. The tribunal concludes in the circumstances that it was reasonably practicable for the Claimant to have presented her claim form in time, and that she failed to do so."**

15. A Notice of Appeal was lodged. Since it appeared to HHJ Eady, on the sift, that it raised the early conciliation procedure and there had been no decided case on that before, she thought

it sensible that there should be a Preliminary Hearing. At that Preliminary Hearing the Claimant had the benefit of being represented by counsel, Richard Hignett, under the ELAAS Scheme. The two amended grounds of appeal were substituted for the original Notice of Appeal before Singh J. They are the grounds which I have to consider now on the full appeal.

16. The first, in essence, is that the Tribunal was not entitled to infer that the claim form did not contain the correct information in respect of the ACAS certificate number. It is argued that inspection of the certificate and the ET1 claim form submitted on 1 July 2014 would have revealed no discrepancy. Secondly, the Tribunal erred in concluding that it was reasonably practicable for the Appellant to have represented her claim by the deadline of 5 July 2014. It relies upon the incorrect addressing of the letter sent by the Tribunal Service to the Claimant.

Submissions

17. The Claimant has explained how she considers now that the form which she received back from Leicester did contain the correct ACAS number. There was no fault in it, and she tells me that she took it back to the Tribunal, pointed that out, and in general terms, that seemed to be accepted by the Tribunal Service in due course. Secondly, she argues that if the rejection form had been correctly addressed, it would have arrived on Friday the 4th and she would have been able to resubmit the form that day. She acted without any delay having received the form over the weekend, and thus her submission on this was credible.

18. A claim should only be held to be not reasonably practicable to make if there is some fault on the part of the Claimant. As May LJ said in **Palmer and Saunders v Southend-on-Sea Borough Council** [1984] ICR 372:

> **"Where a mistake is alleged, it is the reasonableness of such ignorance or mistake that is in the end determinative of whether it is reasonably practicable to make a complaint in time."**

She relies upon the case of **Sorelle v Rybak** [1991] IRLR 153 to make the point that there is no general rule that a Claimant is bound by the advice which they receive. That was a case in which the Appeal Tribunal, presided over by Knox J, concluded that there was no principle that mistaken advice from a third party would prevent an employee from establishing that it was not reasonably practicable to present the claim in time. She has in mind the advice that she had here from Mr McKenzie. She also has in mind the fact that in **Sorelle v Rybak** the fault had been that of an Employment Tribunal employee who she said, in evidence which was accepted, had wrongly told the Claimant what the closing date was for her application.

19. The Judge, however, did note that what had been established as a general principle was that a failure by an advisor, such a solicitor, trade union officer or Citizens' Advice Bureau officer, to give correct advice would prevent the employee from claiming that it was not reasonably practicable to apply in time. There was a clear factual difference between on the one hand advice obtained by a Claimant from someone who was asked, whether for a fee or not, to advise the Claimant in the presentation of his claims against the employer, and on the other hand advice obtained by the Claimant from the Tribunal Service itself.

20. Mr Bloom, acting for the Respondent as he did at the Preliminary Hearing, takes his stand on each of the two grounds of appeal by relying upon the conclusions which the Tribunal Judge reached. He does not accept any suggestion that the findings were unfaithful to the evidence. The Tribunal Judge had been entitled to infer, as I have set out at paragraph 11 of its Decision. There was no argument which was pursued as to reasonably practicability: that was conceded. It was not therefore open to the Claimant to complain now about the rejection of an argument which had been given away on her behalf by Mr McKenzie, but in any event he argued that the real fault here was the Claimant's small but critical error in failing fully, as the

Tribunal thought, to record the number of the early conciliation certificate correctly on the form.

Discussion and Conclusions

21. The first ground argues that the Tribunal was not entitled to draw the inference it did as to the error which had been made. There was no direct evidence in documentary form as to the error. This is not a case in which the Tribunal had before it both the first claim form submitted and the second, so as to compare them. However, it heard the oral evidence from the Claimant which it recorded at paragraph 8. In the course of that, it recorded the Claimant saying that she had had to add two digits to paperwork to correct it and could not honestly recall which particular document that was. It concluded that the document must have been the claim form, because it was that which was returned to the Claimant. The issue for me is whether that was permissible as a conclusion. Sadly for the Claimant, for whom like the Tribunal I have considerable sympathy, I have concluded that the Tribunal was entitled to reach that view. It had to look at the material before it. It did not have the advantage of the Claimant's current recollection that there was no error in the form. She had given the evidence which she did, which is set out at paragraph 8.

22. Once it is accepted that the Tribunal was entitled to think that the form did have a couple of digits missing, the question is whether the Tribunal was then obliged to reject the form. The wording of Rule 10 was not significantly in issue before me. Where the rule requires an early conciliation number to be set out, it is implicit that that number is an accurate number. The Tribunal had found it was not. Once that appeared to be the case, the Tribunal was obliged to reject it, and that rejection would stand, subject only to reconsideration, which here was not asked for. Although that might have been the failure of Mr McKenzie and not the Claimant

herself, the Tribunal Judge had Mr McKenzie before him as her representative and was entitled, therefore, to think that there was no application for reconsideration.

23. As to the second ground, the difficulty here too is the lack of argument to the effect that it had not been reasonably practicable for the Claimant to present the claim earlier than she did. Where an argument is not pursued before a Tribunal, a Judge is entitled to conclude that, since the burden is on the Claimant to show that it was not reasonably practicable, she has failed to discharge that burden. That decision was in accordance with the law.

24. An argument that it was not reasonably practicable would actually have been quite difficult in this case because the Claimant had actually submitted a form in time save only for the fact that she had misplaced or misrecorded the numbers on it, so the Tribunal thought. Indeed the Tribunal did not simply, in paragraph 24, decide the question on the absence of any argument by the Claimant, but it went further. It may have had in mind the fact that the Claimant herself had plainly not been entirely happy with the way that Mr McKenzie was putting her case. But it observed there that this was not a case in which there was no fault on behalf of the Claimant. The fault might not be great, but it was her responsibility, as the Tribunal thought, to make sure that the right conciliation number was used and that that was what the Tribunal concluded had not occurred. It was thus entitled to come to the conclusion it did on either of the two grounds that it used for concluding that the "not reasonably practicable extension" did not apply.

25. There is now no ground of appeal other than those two. Since in my view, for the reasons I have given, the Judge was entitled to come to the conclusion he did, and did not make an error of law in doing so, this appeal has to be rejected.

26. I would say only this, that any court must be concerned with what might be thought to be the draconian effect of an error of relatively simple form namely an unintentional failure to record a number correctly. Though it may be part of the answer to suggest that Claimants should submit a form well within the period of three months, they are nonetheless entitled to submit a form at any stage within those three months. It may well be that the answer, where there is a simple error of this sort, is an application for reconsideration, as I have mentioned. It may be open to argument, as Mr Bloom mentioned, that Rule 6, which permits a Tribunal to excuse irregularities and non-compliance might have some applicability, but that too was not argued before the Judge, and he cannot be blamed for failing to consider it.

27. Accordingly, though not without the sympathy for Mrs Sterling that I have expressed, this appeal is rejected. The Claimant is left with a claim, which will encompass dismissal, but that is solely in compliance with the law in respect of discrimination, and not that under the **Employment Rights Act 1996** in respect of unfair dismissal.