Case Number: 3200757/2016

EMPLOYMENT TRIBUNALS

Claimant: Mr D Platt

Respondent: British Telecommunications Plc

Heard at: East London Hearing Centre **On:** 1 September 2017

Before: Employment Judge Ferguson

Representation

Claimant: In person

Respondent: Ms K Bradley (Solicitor)

UPON APPLICATION made by the Claimant under rule 71 of the Employment Tribunal Rules of Procedure 2013, by email dated 9 May 2017, to reconsider the judgment sent to the parties on 26 April 2017

JUDGMENT

It is the judgment of the Tribunal that:-

1. The judgment sent to the parties on 26 April 2017 is revoked.

2. The Tribunal has jurisdiction to hear the Claimant's claim.

3. The Claimant shall pay the Respondent £1,000 in costs.

REASONS

1. The Claimant seeks to bring complaints against the Respondent of unfair dismissal, failure to pay notice pay and failure to pay holiday pay.

2. At a Preliminary Hearing on 3 April 2017 I dismissed the Claimant's complaints on the basis that that they were presented out of time and the Tribunal therefore had no jurisdiction to hear them. The judgment was sent to the parties on 26 April 2017. On 9 May 2017 the Claimant applied for reconsideration of that judgment.

FACTS

3. The agreed factual background to the presentation of the claim was as follows.

3.1 The Claimant was employed by the Respondent from July 1972 until he was summarily dismissed for gross misconduct with effect from 28 April 2016. His appeal against dismissal was rejected on 16 June 2016. On 18 July 2016 the Claimant contacted ACAS to notify them of a potential claim against the Respondent. He named his employer as "British Telecommunications" and was issued with an Early Conciliation ("EC") certificate on 19 July 2016. On receipt of that certificate the Claimant, on the advice of a union representative, contacted ACAS on 19 July 2016 to change the name of his employer to British Telecommunications PLC. A second certificate was issued on 26 July 2016 with a different reference number.

3.2 On 15 August 2016 the Claimant submitted a claim form online. He did not provide an EC reference number. The claim form was rejected under Rule 10 of the ET Rules by letter dated 16 August 2016. This explained that the claim had been rejected because there was no EC number on the claim form and enclosed explanatory notice, which included information about applying for reconsideration of the decision.

3.3 On 1 September 2016 the Claimant sent a letter to the Tribunal by email, applying for reconsideration of the rejection of the claim form. He apologised for the delay in responding to the letter of 16 August, which he said he had only just received "due to family commitments". He asked for the rejection to be reviewed and explained that the electronic form would not allow him to enter the ACAS number despite several attempts. He submitted the form anyway as he was due to go away on a family holiday. He gave both EC numbers from the first and second certificates. It appears that this email may not have been received, but a hard copy of the letter was received on 5 September 2016. The EC number provided for the second certificate was missing the last two digits, resulting in further correspondence between the Tribunal and the Claimant. On 16 September 2016 the Tribunal accepted the claim form and treated it as presented on 5 September 2016.

4. The Respondent responded to the claim, arguing among other things that it was out of time.

5. On 28 October 2016 the Tribunal made an unless order saying that the claim appeared to be presented outside the applicable time limit and would stand as dismissed on 30 November 2016 unless the Claimant presented a written request for a hearing or explained in writing why the claim should not be dismissed. The Claimant responded on 31 October 2016 saying that he missed "the closure date of the 14th October". This appears to be a mistaken reference to the date for the Respondent to submit its ET3. He said that he had been incapacitated due to an accident on 11 September in which he fractured his spine. Information about his injuries and treatment was provided.

6. On 14 December 2016 the Tribunal's unless order was varied to state that the claim would stand as dismissed on 10 February 2017 unless the Claimant presented a written request for a hearing or explained why the claim should not be dismissed. The Claimant responded on 6 February 2017 referring to his "noncompliance in October

2016". He continued, "During the period that I was due to respond to the Tribunal court and BT regarding my case I was still suffering from stress and depression caused by the malevolent management collaborating and being responsible for my dismissal from BT after an unblemished 44 years' service and still feel depressed over this treatment, this then followed by my unfortunate accident of which the NHS substantiate all the details". The letter goes on to refer to the "closure date of 14th October 2016" and gives more information about the accident on 11 September 2016.

7. The Tribunal listed a Preliminary Hearing on 3 April 2017 to determine whether the Claimant's complaints should be dismissed as out of time.

8. At the hearing the Claimant gave evidence that before submitting his claim online on 15 August 2016 he attempted several times to enter the EC reference number given on the second certificate but it was not accepted. He speculated that he may have omitted the last two digits. He said that he spoke to the ACAS conciliator after he realised there was a problem with the number but she said she could not give advice and simply referred him to the certificate.

9. His evidence about when he received the Tribunal's rejection letter was somewhat confused. He said he went on holiday to Mexico for two weeks sometime in late August for a wedding, but he could not remember exactly what the dates were. I allowed him to look at his mobile phone to try to find the dates, but he was unable to find the information. He first said it must have been 22 August, but then later said it was 17 August. As to whether he saw the Tribunal's letter before he went away, he first said that he did and that he spoke to the union representative on the same day. He said he was intending to resolve it when he got back from holiday. Later he said that he did not see the letter until 1 September, after he returned.

10. The Claimant also argued that he had been suffering from stress and depression since his dismissal.

11. I gave an oral judgment at the end of the hearing, in which I made the following findings:

11.1 The principal time limit for the Claimant's complaints expired on 27 July 2016. Since the second certificate was issued on 26 July, the expiry of the extended time limit for all of the Claimant's complaints was 26 August 2016.

11.2 It was reasonably practicable for the Claimant's complaints to be presented by 26 August 2016. This was on two grounds:

11.2.1 It was reasonably practicable for the Claimant to submit his claim form when he attempted to do so on 15 August 2016. He had the relevant EC number and it appears he made a mistake entering it. There was no obstacle to him entering the correct number.

11.2.2 The Claimant had an opportunity to correct the error before the expiry of the time limit. Whatever the precise dates were, the Claimant did not leave for his holiday earlier than 17 August 2016. His first account of receiving the Tribunal's letter of 16 August 2016 was correct. He received it before going on holiday,

on or around 17 August 2016, and intended to deal with it on his return. It was reasonably practicable for him to respond to the Tribunal's letter by 26 August 2016. The Claimant was unclear in his evidence about his knowledge of Tribunal time limits. It is likely that he knew about the time limit, but even if he did not he had access to advice from his union representative to find out.

11.3 On the basis of those findings the Claimant's complaints were dismissed as out of time. The written judgment was sent to the parties on 26 April 2017.

12. On 9 May 2017 the Claimant emailed the Tribunal saying that he wanted to "appeal" the judgment on a number of grounds. One of his arguments was that he was in fact abroad from 16 to 30 August 2016 and he attached an email which confirmed the booking of his flights on those dates. I directed that the correspondence should be treated as an application for reconsideration under Rule 71 and notified the parties that my provisional view was that the application had merit. Following the receipt of submissions from the Respondent objecting to the judgment being reconsidered, a hearing was listed to take place on 1 September 2017.

13. The Claimant gave evidence at the hearing, confirming that he was away from 16 to 30 August 2017 and that he did not receive the Tribunal's letter until he returned. The Respondent did not challenge that evidence.

THE LAW

14. Rule 70 of the Employment Tribunals Rules of Procedure provides:

> A Tribunal may, either on its own initiative (which may reflect a request from the Employment Appeal Tribunal) or on the application of a party, reconsider any judgment where it is necessary in the interests of justice to do so. On reconsideration, the decision ("the original decision") may be confirmed, varied or revoked. If it is revoked it may be taken again.

15. The relevant time limits for bringing an ET claim are set out in ss.23 and 111, read with s.207B of the Employment Rights Act 1996. Both sections state that where the tribunal is satisfied that it was not reasonably practicable for a complaint to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it presented within such further period as the tribunal considers reasonable.

16. In accordance with Dedman v British Building and Engineering Appliances 1974 ICR 53 these provisions should be given a "liberal construction in favour of the employee". The question of reasonable practicability is a question of fact and the burden is on the claimant to show that it was not reasonably practicable to submit the claim in time. A mistaken belief as to the relevant facts, including the law on time limits, will only affect the issue of reasonable practicability if the belief is reasonable (Dedman; Wall's Meat Co Ltd v Khan ([1979] ICR 52).

17. Rule 76 of the Employment Tribunals Rules of Procedure provides:

> (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 the way that the proceedings (or part) have been conducted; …

18. Rule 84 provides:

> In deciding whether to make a costs, preparation time, or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying party's (or, where a wasted costs order is made, the representative's) ability to pay.

CONCLUSIONS

19. The Claimant's application is based upon the submission of new evidence showing that he was in fact away from 16 August 2016 and his (uncontested) evidence that he did not see the Tribunal's letter until he returned on 30 August. He wrote to the Tribunal to rectify the defect with the claim form the next day.

20. There are three issues for me to consider:

20.1 Whether it is appropriate in principle to reconsider the judgment in light of the new evidence.

20.2 If the judgment is reconsidered, whether the Tribunal has jurisdiction to hear the claims.

20.3 The Respondent applied for its costs in preparing for and attending today's hearing on the basis that the Claimant acted unreasonably in failing to produce the evidence at the last hearing.

Reconsideration

21. The overarching test in deciding whether to reconsider a judgment under Rule 71 is the interests of justice.

22. The EAT has confirmed that where reconsideration is requested on the basis of new evidence the principles in Ladd v Marshall [1954] 3 All ER 745, CA, relating to new evidence on appeal, "in most cases" encapsulate the interests of justice (Outasight VB Limited v Brown UKEAT/0253/14/LA). Those principles consist of a three-limb test. In summary:

22.1 The evidence could not have been obtained with reasonable diligence for use at the trial.

22.2 The evidence must be such that, if given, it would probably have an important influence on the result of the case.

22.3 The evidence must be apparently credible.

23. The third limb is clearly met. There is an email confirming the booking in the Claimant's name. There is no reason to doubt he travelled on those dates.

24. As to the second limb, the Respondent relies on my earlier finding that the Claimant could have entered the EC number on 15 August and says the new evidence would not make any difference. That finding, however, was not determinative, and even if it had been the EAT confirmed in Adams v BT Plc UKEAT/0342/15/LA that that would not be the correct approach to the question of reasonable practicability. The focus should be on the reason for the claim form being presented late. The key finding in the earlier judgment was that the Claimant had received the Tribunal's letter before going away on holiday. The new evidence shows that that cannot have been the case, so the second limb is satisfied.

25. The first limb is not met. The Claimant had the booking email throughout and could with reasonable diligence have produced it for the hearing in April 2017. The reason he did not produce it was that he failed to appreciate the importance of the issue. I accept that that was the genuine reason, but it does not affect the strict application of the Ladd v Marshall principles.

26. Having said that, I consider that this is an exceptional case where the interests of justice require reconsideration of the earlier judgment notwithstanding that the Ladd v Marshall test is not strictly met. The Claimant has been unrepresented throughout and it is obvious that he did not fully understand what the Preliminary Hearing was about until he attended; he seems to have thought that he missed a deadline in October 2016 and that his accident in September 2016 was therefore relevant. He must have known that the events of August 2016 were also relevant because he brought witnesses to confirm, among other things, that he went on holiday around that time, but he did not recognise the significance of the precise dates. His evidence on that issue was extremely unclear. It is obvious that if he had appreciated the importance of his travel dates he would have produced the evidence, since it supports his position. I made a factual finding that the Claimant did not go abroad until 17 August at the earliest. It would be unjust to proceed on the basis of a finding that I now know to be incorrect. The only real prejudice to the Respondent is that it is put in the position of having to argue the issue again and that prejudice can largely be addressed in a costs order.

Jurisdiction

27. I am satisfied that what happened was that the Claimant attempted to enter the EC number on the online form on 15 August 2016. For some reason he could not do so and he therefore submitted it without the number. He went away on holiday the next day, knowing that he would need to deal with that issue when he returned. I find, however, that he did not realise that the consequence would be that his claim would be rejected in its entirety. If he had known that, there would have been no point in submitting the claim form. I find that he submitted it, knowing that the time limit expired while he was away and assuming that he could correct the issue with the EC number when he returned without affecting the date on which the claim was submitted.

28. That mistaken belief is only relevant to the issue of reasonable practicability if it was reasonable. I find that it was. As pointed out in Adams (paragraph 20), the inclusion of an EC number as a necessary condition of a claim being properly presented is not one that would necessarily be obvious to a Claimant.

29. The Claimant's situation is different from that in Adams because he knew that there was a problem with the EC number, whereas the claimant in Adams was oblivious to the fact that she had omitted two numbers until she received the rejection

letter. But the reason for the Claimant's the delay in providing the EC number was the fact that he had been unable to enter it online and assumed that he could provide it after returning from holiday without affecting the time limits.

30. I take account of the Respondent's argument that the Claimant should not have left it until the last day before going on holiday to submit his claim, but I do not accept that it affects the reasonable practicability argument. In attempting to submit the claim on 15 August the Claimant was well within the time limit and he did not know until he did so that there was any issue with entering the EC number. He was obviously entitled to go on a holiday that had been planned for some time.

31. In summary I find that it was not reasonably practicable for the Claimant to present his claim within the ordinary time limit. He emailed the Tribunal on 1 September 2016, providing the EC number, the day after returning from holiday and seeing the Tribunal's letter. For some reason that correspondence was not received until 5 September so that was treated as the date that the ET1 was presented. But the Claimant acted promptly and I accept that he presented his claim within a further reasonable period.

32. Tribunal does therefore have jurisdiction to consider the Claimant's claims.

33. The Respondent made an additional argument for the first time at the reconsideration hearing that the second EC certificate was invalid, in light of the EAT's judgment in HMRC v Garau UKEAT/0348/16/LA, and therefore the claim form had still not been validly presented. I do not accept that argument. It was held in Garau that the EC provisions do not allow for more than one EC certificate per "matter" to be issued by ACAS. If more than one such certificate is issued, the second certificate is outside the statutory scheme and has no impact on the limitation period. That does not apply to the situation where a claimant obtains a certificate naming the Respondent incorrectly and then later obtains a certificate with the correct name of the Respondent. The Claimant here was doing his best to comply with the EC rules. The second certificate was valid because it was the only one containing the full correct name of the Respondent.

Costs

34. I have found that the Claimant could with reasonable diligence have produced the evidence of his holiday dates before the first Preliminary Hearing. He was given numerous opportunities to provide evidence relevant to the jurisdiction issue and failed to produce anything confirming his holiday dates. I recognise that he was unrepresented, but it would have been an easy task to check the exact travel dates before attending the hearing and his failure to do that was unreasonable. It caused the Respondent to incur the expense of attending today and I therefore make a costs order to cover those costs.

35. The Respondent has claimed 3 hours' attendance today and 12 hours' preparation. I accept the 3 hours' attendance but find that 12 hours is excessive for preparation of a matter that had already been argued once and the new issues were relatively narrow. I do not allow the costs relating to the Respondent's new argument about the second certificate that I have rejected. I consider the fair amount to award is £1,000, which represents approximately two and a half hours' preparation time.

Employment Judge Ferguson

6 September 2017