mf

EMPLOYMENT TRIBUNALS

Claimant: **Mr P Osagiede**

Respondent: **Engie Services Limited**

Heard at: **East London Hearing Centre**

On: **Monday 31st July 2017**

Before: **Employment Judge Prichard**

Representation

Claimant: **Mr T Airuoyo (Legal Executive Church Street Solicitors, Stratford London E15)**

Respondent: **Ms A Ballinger (Engie Services Ltd, Solicitor, Canada Square E14)**

JUDGMENT

It is the judgment of the Tribunal is that this claim was presented late in circumstances where it was reasonably practicable to have presented it earlier for the purposes of s 111(2) of the Employment Rights Act 1996. The claims for unfair dismissal and arrears of pay are therefore dismissed.

The above oral judgment having been announced (with reasons) at the conclusion of the hearing on 31 July 2017, the written judgment without reasons was sent to the parties on 4 August. The claimant's solicitors applied for written reasons for the judgment, by letter of 14 August. Under Rule 62(3) of the Employment Tribunals Rules of Procedure 2013 the reasons are now provided below.

REASONS

1 The claimant, Mr Prince Osagiede, worked for the respondent, Engie Services, for over 2 years and therefore has unfair dismissal rights. He was dismissed on

11 November 2016, originally for gross misconduct arising out of parking his own car on the Queen Elizabeth Olympic Park site where he worked as a security officer. On appeal the sanction was varied to make it a dismissal for misconduct for which a month's pay in lieu of notice was paid to him. The dismissal outcome stood because, at the time, the claimant had a live final written warning apparently arising from not being at his allocated station on duty.

2 The history of how this claim came to be late is complicated.

3 The claimant was represented both at the disciplinary hearing and the appeal hearing by Gloria Sindall his full-time UNITE officer representative. She advised him and helped him before, during, and after his dismissal. There is an appeal against the dismissal which seems to have been submitted by Church Street Solicitors who advised him. His contact there, Ted Airuoyo, who has been his representative today (I presume on a *pro bono* basis), was supporting him throughout the process. They wrote to the respondent on 5 December after the dismissal had occurred. They wrote another letter later on 27 February 2017.

4 On 20 January the claimant's appeal took place. Apparently Ms Sindall could not stay until the end of that hearing so there would have been no discussion after that. She had to go to another appointment. The claimant met her subsequently and it is inconceivable that she would not have mentioned to him at some stage the overall time limits and the complications involved in the time limits. There was the compulsory early conciliation reference to ACAS and the fact that after that has taken place one generally has a month to apply to the tribunal, if one is by then outside the primary 3-month time limit.

5 Although the claimant stated to the tribunal today that it was a complete coincidence the tribunal finds it very hard to accept it was a coincidence that he, the claimant in person, referred the decision for early conciliation on Thursday 9 February 2017, with just one day to spare relative to the primary 3-month time limit from 11 November.

6 Afterwards, the ACAS early conciliation negotiations with the respondent were conducted by Gloria Sindall on the claimant's behalf. He gave her as the contact name, not Ted Airuoyo at Church Street Solicitors. She, then, must have been aware of when the conciliation closed. Somebody, and it was probably the respondent, applied for an extension to the conciliation period from the normal 1 month. Thus the case was in early conciliation for 6 weeks, but no settlement was agreed. On 23 March a certificate was issued and the claimant was, from then on, ready to go to the tribunal. He had 1 calendar month in which to do so. The latest presentation date was therefore 23 April 2017.

7 Meanwhile there was an appeal hearing on 20 January. The appeal outcome letter was not sent to the claimant until 3 February. It is fortunate that 6 days later the claimant referred the matter to ACAS for compulsory conciliation, just in time.

8 The claimant says that that was pure luck as he was unaware of the time limit.

The claimant did have correspondence with Gloria Sindall at that time but says that she was on holiday and not in the office and he does not know where she was at that time. It seems more likely that that was done on some advice, contrary to the claimant's evidence that it was just luck.

9 At some stage in early April the claimant spoke to Ms Sindall and Ms Sindall said that she was going to refer the case papers that she had to Thompsons Solicitors in Congress House. On 19 April the claimant was sent a letter by Mr Carl Harrington, solicitor at Thompsons.

10 The claimant's witness statement for this hearing says he urgently arranged an appointment with Thompsons as soon as he could. Quite what the urgency was if he was genuinely unaware of the time limits is hard to see. He met Mr Harrington 2 days later on 21 April 2017, a Friday. He finished in his meeting with Mr Harrington at 3 or 4pm. This was just 2 days before the deadline for submitting the ET1 claim to the tribunal. The deadline expired on Sunday 23 April. Therefore, that Friday afternoon the claimant was told by Mr Harrington he just had 48 hours to get his ET1 claim in to the tribunal. Mr Harrington told the claimant that he could not help him with his case and that the claimant was on his own.

11 The claimant says he then went into complete panic and was walking round in circles in the street there in Russell Square by Congress House. He telephoned Mr Airuoyo only to find that he had gone to Nigeria and was therefore unable to do anything directly. Mr Airuoyo has informed the tribunal that he managed to telephone the office and got a caseworker there called Linda on to the case to help the claimant get his claim form in. However she was unable to do anything that weekend.

12 The claimant has a computer and an email address, and he has an internet connection to go online but he did not seek help from friends or relations in order to get his claim in on time. Again it is not at all clear why he did not seek such help.

13 I am not sure if the claimant understood sufficiently how important the time-limit was. He should have understood by now. Mr Harrington, a solicitor, had told him. It would also be surprising if Gloria Sindall had not spelled out the importance of the time limit. However, I suspect he did understand the importance well, otherwise he would not have been in such a blind panic that Friday afternoon.

14 That is particularly so for an unfair dismissal claim which has a very limited extension of time provision, when it is not reasonably practicable (s111 of the Employment Rights Act 1996). That test is a long way from involving justice or equity or anything to do with the merits of the case. It is a dispassionate factual enquiry into the practical factual circumstances surrounding the presentation of a claim out of time.

15 A major strand of argument, correctly and understandably argued by Mr Airuoyo on the claimant's behalf is that the claimant has depression. He was first diagnosed in August 2015 when he was suspended from work in connection with an alleged offence for which he was given a final written warning. He was taking prescribed Citalopram for 9 months from March to December 2015. He ceased then in December but started

once more in August 2016 when he was suspended in connection with the alleged offence for which he was dismissed this time. He is still currently taking the medication. Citalopram may well affect the claimant's memory.

16 The process of hearing the claimant give evidence was protracted. He had large gaps in recollection and he was unable to focus on questions. It is hard to know what to put that down to. I cannot rule out the possibility that it is to do with an ongoing depressive state.

17 Nonetheless there are some facts we can extract from this sequence of events as to the input of various legal advisers. Church Street Solicitors, on their letterhead offer employment as one of their 6 areas of expertise. They have been involved and wrote to the respondent on 27 February 2017, in the middle of the compulsory early conciliation period. They were effectively asking the respondent to review the appeal outcome decision even though that outcome letter clearly stated there was no further right of appeal from it. It is always worth having a go.

18 This shows they must still have been in communication with the claimant and should have, and probably did advise the claimant on the time limit. While they were writing this letter, Gloria Sindall was negotiating with the respondent on the claimant's behalf. Church Street Solicitors' letter itself does not refer to the existence of the early conciliation with ACAS which was ongoing at the time.

19 In the end othing was done at the weekend. The claim was therefore presented out of time. The claimant contacted Church Street Solicitors on Monday 24 April and Mr Airuoyo was still away in Nigeria. Arrangements had been made for Linda in the office to organise presenting the claim and she did. It seems the claimant probably picked up from the office all the relevant materials to post to the Leicester central office of tribunals. There was a letter written on his behalf to accompany the claim form. It is in the first person and is signed the claimant. It states:

> "Please find enclosed ET1 form and EX160 for your kind consideration".
>
> I was not advised of the time limit by my Union representative [sic] until Monday 24 April 2017. Please grant me my extension as maybe required."

The EX160 is the form applying for remission from frees. The claimant was granted full remission in the event.

20 The tribunal office staff cannot grant an extension of time. That is not how the tribunals operate. Even the judiciary would never grant an extension by correspondence either. The time limits are jurisdictional. That is why they are important. There always has to be a hearing such as this 3-hour hearing. A major factual investigation needs to be undertaken.

21 In the end, the letter with the claim was posted on Friday 28 April, and was stamped received on Tuesday 2 May 2017, after the Whitsun Bank Holiday weekend. It could, reasonably practicably been sent online by 23 April, and have been on time, in

my view.

22 The union representative is Gloria Sindall and yet the claimant says he did not speak to her on 24 April, at least he cannot remember if he did or not and so it is very hard to see where Linda could have got this information from to put into that letter. Apparently Carl Harrington at Thompsons had said that he did not want to apportion blame because he realised that the whole case had gone wrong, and that the claimant might well become out of time for presenting it. Apparently he had washed his hands of it, and apparently Ms Sindall's as well.

23 So there were 3 sources of advice: Carl Harrington, Gloria Sindall and Church Street Solicitors. However I can accept that the claimant, because of his psychological state felt quite unable to do this on his own. On the Friday afternoon, he knew that he had to present his claim that weekend. It is very hard to find professional help over a weekend.

24 I was troubled latterly by the cases. I was not referred to any particularly useful case law by the parties and have researched it myself. There is a lot of case law in this area. *Schultz v Esso Petroleum Co Ltd* [1999] ICR 1202 Court of Appeal is germane on this point. It is a case where the claimant was unable to instruct solicitors during the last 6 weeks of the 3 month limitation period. The Court of Appeal reversing the decisions of the tribunal and the EAT held that "reasonable practicability" has to pertain throughout the period of 3 months. I asked myself if this might not be a *Schultz* case. However here but there were 2 separate strands of causation for this lateness. In my view the first and predominant one was the default and lack of coordination of a combination of advisers.

25 Where advisers are concerned the law is almost all one way, which is why it was wise of Mr Airuoyo to focus on the depression side of the argument which is a more hopeful road to go down. This is an unusual case. It is not a pure *Schultz* case. The representatives were aware of the timeframes. These were skilled representatives; Gloria Sindall is a salaried UNITE officer; Carl Harrington is a solicitor with Thompsons; and Ted Airuoyo of Church Street Solicitors is experienced in employment law. Even though he was in Nigeria, he should always have known what the timeframe was, and that he would be abroad when time expired. He should have advised the claimant accordingly. Church Street Solicitors' main contribution on 27 February was seemingly doomed because he was trying to appeal an appeal decision when the outcome letter stated it was not appealable.

26 The leading case on advisors is the old authority of *Dedman v British Building and Engineering* [1974] ICR 53 CA. Even the high water mark case of *Marks & Spencer plc v Williams-Ryan* [2005] ICR 1293 CA, is distinguishable on the facts and does not seem to help the claimant in this case. The *Dedman* principle applicable to solicitors was applied to CAB advisers in *Riley v Tesco Stores Ltd* [1980] ICR 323 CA. Trade union representatives were the subject of an early decision in *Times Newspapers Ltd v O'Regan* [1977] IRLR 101 EAT. There have been others which have simply followed the principle since. I cannot see anywhere where the principle has not been followed. The case law is all one way.

27 That the claimant ended up in a situation on Friday 21 April being told he was on his own was really, it seems to me, the product of poor advice, and poor coordination between advisors. Even if the claimant had not had a psychological vulnerability he might have been pushed to present his claim and remission application in time. Where advisers are involved, it seems this kind of brinkmanship over a weekend must be avoided as the argument for "not reasonably practicable" is much harder to run.

28 Responsibility for the claimant seems to have fallen into the cracks between 3 advisers, and I consider that that is the principal reason why the claim was late.

29 I am satisfied therefore that the *Schultz* case can and should be distinguished. Solicitors and a union representative were involved at the point that the claim had to be sent.

30 In all those circumstances and with regret for Mr Osagiede the claim has to be dismissed as being out of time.

Employment Judge Prichard

15 September 2017