Case Number: 1600562/2017

EMPLOYMENT TRIBUNALS

Claimant: **Mr Justin Scannell**

Respondent: **Ganymede Solutions Limited**

Heard at: **Cardiff** **On: 30 October 2017**

Before: **Regional Employment Judge B J Clarke**

Representation:
Claimant: Mr Stephen Jackson (solicitor)
Respondent: Ms Emma Tice (solicitor)

JUDGMENT
(ON A PRELIMINARY POINT)

The Employment Tribunal has jurisdiction to consider the claimant's complaint of unfair (constructive) dismissal. It was not reasonably practicable for the complaint to be presented within the statutory time limit set out at Section 111(2)(a) of the Employment Rights Act 1996 (ERA) and it was presented within a further period that I consider reasonable.

REASONS

Background

1. This case came before me at a preliminary hearing to determine various case management issues, which are the subject of a separate document.

2. In this judgment, I deal with the respondent's application to strike out the claim under Rule 37 of the Employment Tribunal's Rules of Procedure 2013, an application made on the basis that the claim has no reasonable prospect of success because it was presented outside the primary limitation period, such that the Employment Tribunal (ET) has no jurisdiction to hear it. None of the material facts are disputed (and, unusually, some of the facts

are within my own knowledge that I shared with the parties), so the parties have agreed that I should give a judgment on the matter at today's hearing.

The facts

3. The claimant resigned from the respondent's employment on 20 March 2017. The process of ACAS early conciliation lasted from 1 to 30 June 2017. It is common ground that the period for presenting a claim of unfair (constructive) dismissal expired on 30 July 2017. It is also common ground that Mr Jackson had been advising the claimant since February 2017.

4. On 26 July 2017, the Supreme Court handed down judgment in the case of *R (on the application of Unison) v Lord Chancellor [2017] UKSC 51* on the lawfulness of ET fees. During the day, the online ET1 facility was taken down and references to fees on the associated website pages were removed. This meant that the Practice Direction on presentation of claims, which only permitted presentation by three prescribed methods, became defective in part. Those prescribed methods were (1) using the online facility, (2) by post to the central ET office in Leicester or (3) in person to a scheduled ET office during business hours. The first method, for a while, ceased functioning while the fee facility was removed. In fact, it was down for five days between about 3pm on 26 July 2017 and about 5pm on 31 July 2017.

5. The Practice Direction is made under Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. Rule 8(1) of the ET's Rules of Procedure makes clear that a claim must be started using the prescribed form and in accordance with the Practice Direction issued for this purpose.

6. The precise dates and times put forward by Mr Jackson were, as the respondent has noted, muddled; indeed, they have changed throughout his correspondence. That said, the common theme, which is not disputed, is that he sought to present the claimant's claim using the online facility on the same day that the Supreme Court handed down its judgment. This would have been within the primary limitation period. However, the online process was interrupted during its submission. Despite Mr Jackson's request, HMCTS has not been able to provide him with any records validating his attempt at submission. In the circumstances, and given that the thrust of his account is not disputed, I accept that Mr Jackson's attempt at online submission of the claimant's ET1 failed and I infer that it failed for reasons outside his control that were connected to the interruption of that facility following the Supreme Court's judgment.

7. On 27 July 2017, recognising that the online facility was offline and that claimants were emailing ET1s to individual ET offices, the President of

Employment Tribunals for England and Wales drafted an amendment to the Practice Direction to remove references to fees and to permit ET1s to be submitted by email to an ET office or a central email address. That amended Practice Direction did not take effect at the material time because it had not been approved by the Lord Chancellor. It seems that the message reached some ET staff that the amended Practice Direction had taken effect when, in fact, it had not. In this case, for example, Mr Jackson was informed by a clerk based in the Cardiff office of Wales ET that ET1s were being accepted by email in Cardiff. Acting on this advice, Mr Jackson emailed the claimant's ET1 to the Cardiff inbox on 28 July 2017. Once again, this would have been within the primary limitation period.

8. On 2 August 2017, I learned of the message being given by staff in Wales ET. I informed them that it was wrong and that, until the amended Practice Direction had been approved by the Lord Chancellor, the ET had no power to accept claims presented in this manner. I directed that all those claimants or representatives who had acted on this advice should be informed that their claims were not accepted and that they should be returned to them. However, with the agreement of the President, the standard letter for this purpose was amended with the addition of this paragraph:

> *Regional Employment Judge Clarke has asked me to point out that he is aware that the online submission service (mentioned at paragraph 1 above) was taken down between about 3pm on Wednesday 26 July and 5pm on Monday 31 July. He is also aware that some of the clerks had advised users, incorrectly, that it was acceptable to send their claims by email directly to the Cardiff office. It remains the case that the above presentation methods are the only ones that are acceptable. If you decide to present your claim again using one of these prescribed methods, and the effect is that your claim is presented late, a judge will have regard to the above incorrect advice when deciding whether the time limit for the presentation of your claim should be extended. The respondent to your claim will also have an opportunity to comment. In some cases, in may be necessary to have a hearing on the point.*

9. In this claimant's case, the above letter was emailed to Mr Jackson at 11.21am on 3 August 2017. He took steps the same day to send the ET1 by recorded delivery to the central ET office in Leicester. It arrived in Leicester the following day and the submission date and time was recorded as 4.12pm on 4 August 2017. This, of course, was outside the primary limitation period.

10. In accordance with the President's case management order, there was a short stay of all *Unison*-related claims and applications. Accordingly, it was not until 1 September 2017 that Wales ET notified the claimant that his claim had been accepted and served it upon the respondent. When providing its grounds of resistance, the respondent made clear its view that

the claim had been presented late and that the tribunal had no jurisdiction to hear it. It has maintained that position in subsequent correspondence.

The relevant law

11. In relation to the presentation of unfair dismissal claims, Section 111 ERA provides as follows:

> *(2) … 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.*

12. The so-called "escape clause" is found at limb (b) above. The claimant bears the burden of proving both that it was not reasonably practicable for him to have presented his claim in time and that he presented it within such further time as is reasonable. The standard of proof is the balance of probabilities.

13. In the leading case of *Palmer and another v Southend-on-Sea Borough Council* [1984] IRLR 119, the Court of Appeal described the "reasonable practicability" test as one of "reasonable feasibility". It identified various factors relevant to the availability of the escape clause in any particular case:

- The manner of, and reason for, the dismissal;
- Whether the employer's conciliation machinery had been used;
- The substantial cause of the claimant's failure to comply with the time limit;
- Whether there was a physical impediment, such as illness or a postal strike;
- Whether and when the claimant knew of their rights;
- Whether the employer had misrepresented any relevant matter to the claimant;
- Whether the claimant had been advised by anyone and the nature of the advice given; and
- Whether there was any substantial fault on the part of the claimant or their adviser leading to a failure to present the complaint in time.

14. Subsequent case law has identified a range of situations in which disputes about the availability of the escape clause most often arise: ignorance of the

law; ignorance of material facts; incorrect information from advisers; illness; pending internal proceedings; and postal delays. There are three further authorities relevant to this issue:

14.1 The first is *Consignia plc v Sealy* [2002] IRLR 624, which concerns problems with online submission. The Court of Appeal held that if a claimant has done something that, in the normal course of events, would have resulted in his or her claim form being presented within the relevant time period, but owing to some unforeseen circumstance this did not happen, it will have been not reasonably practicable for the claimant to have presented the claim in time. If this condition is satisfied, it does not matter why the claimant waited until the last moment to present the claim.

14.2 The second is *Initial Electronic Security Systems Limited v Avdic* [2005] ICR 1598. Burton P emphasised that the "*Consignia* escape route" (his term) would only be available where a claimant could rely on a claim form arriving in time in the ordinary course of events. If he or she could not rely on that route, it would still be necessary to look to the claimant to provide a satisfactory explanation as to why he or she left it to so late in the day to present a claim. Burton P further concluded that the "ordinary course of email" would be "a relatively short period of time after transmission; 30 or 60 minutes might be thought to be the normal maximum by way of reasonable expectation, absent any contrary indications".

14.3 The third is *London International College Ltd v Sen* [1992] IRLR 292, where the EAT (subsequently upheld by the Court of Appeal at [1993] IRLR 333) held on the facts that a claimant had been entitled to rely on incorrect advice from a tribunal employee when presenting a late claim, with the effect that it had not been reasonably practicable to have presented it within time.

Submissions

15. Both parties supplied submissions in writing which they supplemented orally. I summarise them as follows:

15.1 On behalf of the claimant, Mr Jackson contended that the original online submission was valid and, if not, that he was entitled to rely on the advice from a tribunal employee that the President's Practice Direction had been amended to permit presentation by email to an individual ET office. If that advice was incorrect (on which he adopted a neutral position), Mr Jackson contended that he acted reasonably thereafter in posting a copy to the central ET office in Leicester.

15.2 On behalf of the respondent, Ms Tice contended that Mr Jackson was at fault in leaving presentation until late in the day, the principal cause of these difficulties, bearing in mind that he had been instructed by the claimant for some months. She contended that, when faced with doubt over whether the online submission of the ET1 had failed, he ought to have acted more swiftly in accordance with the terms of the Practice Direction in the form that it was published and not acted in reliance upon a tribunal employee's assertion that it had been amended.

Analysis and conclusions

16. Applying the *Consignia* case, it is immaterial that Mr Jackson left matters until the final week or so of the primary limitation period before acting. The reality is that he could not have acted until 30 June 2017 in any case (regardless of having been instructed by the claimant since February 2017) since that is when ACAS issued the early conciliation certificate. If the online submission service had been working properly on 26 July 2017, then, applying the *Initial Electronic Security Systems* case, Mr Jackson could have expected the claimant's ET1 to be received by the tribunal within 30 to 60 minutes – which, on any analysis, was still plenty of time before the primary limitation period expired on 30 July 2017. As I found above, Mr Jackson's attempt at online submission failed for reasons outside his control that were connected to the interruption of that facility following the Supreme Court's judgment. It was not reasonably foreseeable that the Supreme Court's judgment would result in the online submission service being unavailable for five days.

17. I have explained above the circumstances in which a clerk of the tribunal came to advise Mr Jackson that submission via email to an individual ET office was acceptable and I have explained that, until the President's draft amendments to the Practice Direction had been approved by the Lord Chancellor, that advice was wrong. Nonetheless, in the short period of uncertainty that followed the Supreme Court's judgment, I consider (applying the *Sen* case) that Mr Jackson acted reasonably in relying upon the clerk's advice to present the ET1 via email directly to the Cardiff inbox. Had that advice been correct, no limitation problem would have arisen.

18. Once the true position was made clear in the ET's letter dated 3 August 2017, there can be no doubt that Mr Jackson acted with commendable swiftness in posting, the same day, a hard copy of the claimant's ET1 to the central ET office in Leicester.

19. In my judgment, therefore:

19.1 It was not reasonably practicable for this claim to be presented before the expiry of the primary limitation period on 30 July 2017; and

19.2 Mr Jackson presented it on the claimant's behalf within a reasonable period thereafter.

20. Case management orders and directions are set out separately.

Regional Employment Judge B J Clarke
Dated: 31 October 2017

JUDGMENT SENT TO THE PARTIES ON

1 November 2017

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS