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EMPLOYMENT TRIBUNALS

Claimant: **Mrs S Choudhury**

Respondent: **Co-Operative Group Ltd**

Heard at: **East London Hearing Centre** **On: 11 October 2017**

Before: **Employment Judge O'Brien (sitting alone)**

Representation

Claimant: Miss C Maclaren (Counsel)

Respondent: Mr J England (Counsel)

JUDGMENT

The judgment of the Employment Tribunal is that the claim was not brought within the period provided for by section 111(2) of the Employment Rights Act 1996 and is therefore dismissed.

REASONS

1 By ET1 accepted by the Employment Tribunal on 15 June 2017, the Claimant complains of unfair dismissal.

2 The Respondent resist the claim, although the ET3 was presented out of time and it would have been necessary to consider whether to extend time had the claim itself been presented in time.

3 The matter was listed for a Preliminary Hearing (Open) by Employment Judge Russell to consider whether the Employment Tribunal had jurisdiction to hear the claim given it had been presented on the face of it out of time.

4 I heard from the Claimant on the basis of a written witness statement and was provided with a handful of documents: a letter from the Claimant's trade union dated 24 March 2017; an attendance note from Community Links Legal Advice Service dated

17 May 2017; an extract from the ACAS booklet conciliation explain; and proof of travel to Bangladesh.

5 I was also provided with written notes which formed the bases of submission of both Counsel and relevant authorities.

Facts

6 The Claimant is a naturalised British citizen of Bangladesh origin. Her first language is Sylheti but she speaks and understands English excellently and has not given evidence that she was unable to understand any of the correspondence relevant to the case.

7 The Claimant worked for the Respondent from 10 May 1999 until her summary dismissal (on the stated grounds of conduct) on 12 January 2017.

8 She was a fully paid up member of USDAW throughout the relevant period of time.

9 The Claimant attended a disciplinary meeting on 12 January 2017 with a companion from USDAW. Discussion took place on that day about the time limits for bringing an unfair dismissal claim.

10 The Claimant's union assisted her with drafting an appeal letter which was submitted on 21 January 2017 and accompanied her to the appeal hearing on 16 February 2017. Her representative was Jamie Gull.

11 The Respondent was aware that the Claimant had booked a holiday between 19 February and 19 March 2017 to attend a wedding in Bangladesh and wished her a pleasant holiday. The Respondent indicated that it would write to her on her return with the appeal outcome. As it was the outcome letter was sent on 10 March dismissing the appeal.

12 The Claimant contacted her trade union on 20 March seeking assistance for a claim to the Employment Tribunal. On 24 March, the trade union sent her a letter giving the Claimant the following instruction:

> "*To apply for Usdaw assistance with an employment tribunal claim you must complete and return the enclosed Pack with the relevant documents to my office at the above address within 10 days. It is important to comply with this deadline so as to allow us to consider your application as quickly as possible. If it is late, this may jeopardise your application for assistance.*"

13 On page 2 of the letter it gave the following warnings about time limits and the need to undergo early conciliation:

> "*To make an employment tribunal claim you must complete an ET1 form and send it to the employment tribunal. The best way to do this is on-line at www.justice.gov.uk/tribunals/employment*

You must ensure that your claim reaches the tribunal within the time limit which is usually three months less a day from the date of the incident you are complaining about. It is your responsibility to ensure that any claim is submitted in time.

Early Conciliation

Before your ET1 will be accepted you must have an Early Conciliation Certificate Reference Number. To obtain one you must contact ACAS and tell them of your intention to make a tribunal claim. They will ask whether you want to use their free Early Conciliation service. There is no obligation to do so and if we grant legal assistance, we may advise against it. This is because you are likely to have already tried to resolve the matter through the internal company procedures (and if you haven't we will advise you to do so). Even if you agree to early conciliation your employer is likely to refuse to participate.

Contacting ACAS regarding early conciliation will "stop the clock" on the tribunal time limit and time will only start to run again when the early conciliation certificate is issued by ACAS. This means that the time limit for most claims will be three months less a day plus the time during which ACAS conciliates.

However, if the time limit on the claim is due to expire within one month of the clock restarting after ACAS involvement, there will be one month to submit the claim.

For more information on Early Conciliation please refer to our Factsheet which is enclosed with this letter and can be found on our website."

14 The Claimant called the next day and was told that her documents had been passed to USDAW's legal department. She called on average once a week thereafter for updates.

15 On 10 May 2017, USDAW wrote to the Claimant informing her that it would not be taking up her case and also that it was now out of time. The Claimant received the letter on 12 May and made an appointment to see Community Links Legal Advice Service on its next employment right session on 17 May.

16 At this session the Claimant was given the ACAS booklet in which the ACAS telephone number was drawn to her attention. The Claimant called ACAS the next day and they advised her to complete an ET1 without delay. The Claimant does not recall being reminded about the need to complete early conciliation.

17 The Claimant submitted an ET1 on 20 May and was informed by letter dated 9 June that it was rejected for failure to complete early conciliation. The Claimant underwent early conciliation between 10 and 12 June 2017 and submitted an EC certificate reference number on 15 June and the Employment Tribunal accepted the claim on that day.

The law

18 Section 111(2) and (2A) of the Employment Rights Act 1996 (ERA) provide as follows:

> *"(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.*
>
> *(2A) section 207B (extension of time limits to facilitate conciliation before institution of proceedings) apply for the purposes of subsection (2)(a)."*

19 Section 207B provides for an extension of time for the proceedings of early conciliation. Section 18A(1) of the Employment Tribunals Act 1996 provides that before a person presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information in the prescribed manner about that matter and subsection (8) provides that a person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4) which makes the relevant provisions for an ACAS early conciliation certificate.

20 The phrase not reasonably practicable has been held to mean not reasonably feasible, see **Palmer and another v Southend on Sea BC [1984] I.R.L.R. 119**. This is a question of fact which must be judged taking into account all of the relevant circumstances of the case which include as also set out in the same case such matters as knowledge of rights, any misrepresentations made by the employer to the employee, advice given to the employee and any substantial failure made by the employee or his or her representative.

21 The fact that the employee is pursuing an internal appeal does not of itself render the institution of proceedings not reasonably practicable. In **John Lewis Partnership v Charman UKEAT/0079/11/ZT** as was provided to me by the Claimant Mr Justice Underhill President held that it was not unreasonable for an employee to defer investigating the possibility of Employment Tribunal action until after conclusion of an internal appeal. However, he distinguished early authority such as **Bodha v Hampshire Area Health Authority [1982] ICR 200** on the basis that the claimants in those other cases were being advised by the trade union representative whereas Mr Charman was not.

22 It was held by Lord Denning Master of the Rolls in **Dedham v British Building and Engineering Appliances Ltd [1974] ICR 53** that:

> "*If a man engages skilled advisers to act for him and they mistake time limit and present the claim too late he is out his remedy is against them.*"

Whilst that case involved solicitors the same principle applies to trade union representatives.

Conclusions

23 The Claimant was an entirely straightforward witness who was doing her best to assist the Employment Tribunal. I accept that she had no personal prior experience in Employment Tribunal proceedings and relied on the expertise and advice of her trade union representatives and lawyers. It has to be said that she was not well served by them at all.

24 When the Claimant says that ACAS did not tell her that she needed to undergo early conciliation when she contacted them on 18 May, I accept that she certainly did not understand that they had told her of the need so to do. She was at that time very stressed indeed, having learned that she was apparently out of time to bring her claim, and so might easily have misunderstood what was being told. However, there are a number of matters which, nevertheless, weigh heavily in the balance against the Claimant in my exercise of the law in extending time.

25 First, when the Claimant was written to on 24 March 2017 by her trade union, she could still have commenced early conciliation in time. She was expressly warned that there were time limits that applied and that it was her responsibility to ensure the claim was submitted in time. The Claimant says that she was unclear about whether the time limits began with dismissal or conclusion of the appeal but she failed to clarify this with her trade union at any point. This was an unreasonable failure on the Claimant's behalf.

26 In any event, her trade union should have known about the time limits and by 25 March was aware of all of the facts of the case. The trade union could and should have prompted the Claimant to protect her position. This failure, by skilled advisors, is one which unfortunately falls to the Claimant to bear responsibility for.

27 Further and in any event, the Claimant was told of the requirement to contact ACAS regarding early conciliation in order to stop the clock and could herself have contacted them at that point.

28 In all the circumstances it was reasonably practicable for early conciliation to have commenced in time and for the claim ultimately to have been brought in time.

29 Even if I am wrong and it was not reasonably practicable for the claim to have been brought before the expiry of the principal time limit, the Claimant was informed at least once and probably twice of the requirement to undergo early conciliation prior to submitting the ET1. The 24 March letter gives a sufficiently clear warning; and the ACAS booklet similarly includes an express warning to undergo early conciliation.

30 Therefore, notwithstanding ACAS's failure to mention the same on 18 March or the Claimant's failure to understand the warning given on that date, the Claimant should have been aware that she had to undergo early conciliation prior to submission of the ET1 on 20 May. The fact that the Claimant was stressed and/or misunderstood the situation is ultimately not a reasonable explanation for the failure. The delay thereafter, I conclude, made the period of extension sought an unreasonable period of time.

Employment Judge O'Brien

7 November 2017