Case Number: 3200909/2017

RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Spowart**

Respondent: **Clipper Logistics Plc**

Heard at: **East London Hearing Centre**

On: **14 December 2017**

Before: **Employment Judge Foxwell**

Representation

Claimant: Mr E Benson (Free Representation Unit)

Respondent: Mr N Caiden (Counsel)

JUDGMENT having been sent to the parties on 18 December 2017 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Introduction

1 The Claimant, Mr John Spowart, presented a claim to the Tribunal against the Respondent, Clipper Logistics PLC, of public interest disclosure ("whistleblowing") detriment on 3 August 2017. The last detriment relied on in the claim was termination of his engagement as an agency worker at the Respondent's warehouse in Harlow on 14 November 2016. The Claimant had engaged in early conciliation through Acas between 1 December 2016 and 1 January 2017 prior to commencing the claim.

2 Following service of the Claim, the Respondent filed a Response disputing it on the merits but also challenging the Tribunal's jurisdiction on the basis that it had been presented outside the ordinary time limit for such claims.

3 The Claim and Response were reviewed by Employment Judge Gilbert who directed that there be a Preliminary Hearing to identify the issues and consider Case Management and a further Preliminary Hearing to decide the jurisdictional issue. The first of these two hearings came before Judge Brewer on 26 October 2017 when he defined

the issues in the case. This hearing has been to deal with the jurisdictional question. The issue is a fundamental one - if the Tribunal has no jurisdiction to hear the claim then it must dismiss it.

4 I considered the evidence of the Claimant contained in a witness statement and in a skeleton argument prepared for this hearing to decide the question of jurisdiction. The Claimant was cross-examined on his evidence by Mr Caiden. Mr Benson had the opportunity to re-examine and I asked one or two supplemental questions. In addition to this I considered the documents to which I was taken in a bundle most of which comprises the pleadings, Case Management Orders and exhibits to the Claimant's witness statement. Finally, I read the skeleton arguments prepared by the advocates and they both had the opportunity to amplify those submissions orally. I am grateful to them both for the care they took in presenting their cases and I hope Mr Caiden does not take offence if I single out Mr Benson for particular thanks given the work that the Free Representation Unit does for which we are grateful.

The law

5 The relevant legal principles are not in dispute in this case. The applicable time limit is contained in Section 48(3) of the Employment Rights Act 1996:

> *48(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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.*

6 The basic time limit in simple terms is, therefore, three months from the date of the act complained of. The Tribunal has power to extend that time limit provided that two conditions are satisfied. The first is that it was not reasonably practicable to present the claim within the primary time limit and the second is that the claim is presented within a reasonable time of it becoming reasonably practicable to do so. The burden of proof in establishing the Tribunal's jurisdiction lies on the Claimant and that is why I heard evidence from the Claimant as part of this hearing.

7 It is trite law that the test of reasonable practicability is one of what was practical or feasible to do in the circumstances; it is not a broader test of what might be just and equitable requiring me, for example, to balance competing prejudices between the parties (that is the position under the Equality Act 2010). It follows that the test under the Employment Rights Act may mean that a strong claim on the facts will fail in law simply because it was presented late in circumstances where it had been reasonably feasible to present it in time.

8 The Tribunal must decide what were the impediments to presenting the claim in time when deciding the issue of reasonable practicability. These may be easy to identify in some cases, for example a postal strike delaying mail or a Claimant suddenly finding

themselves in hospital. The authorities recognise that ignorance of the true state of affairs, such as the right to bring a claim or the time limit for doing so, may be an impediment for this purpose but only in so far as it was reasonable for a claimant to be, and to remain ignorant of the key fact or facts, see *Walls Meat Co Ltd v Khan [1979] ICR 52*.

The Claimant's explanation for delay

9 Against that background I turn to the Claimant's explanation for his delay in presenting the claim. The starting point is his discussions with ACAS during early conciliation. I have reminded myself that discussions with ACAS are subject to statutory privilege against disclosure. This can be waived by a party in respect of their own discussions with ACAS (Section 18(7) of the Employment Tribunals Act 1996). That is what has happened here and, therefore, what the Claimant has told me about these discussions is admissible in evidence.

10 The Claimant said that the conciliator informed him that there was fees regime in the Employment Tribunal; that it would cost him at least £1,200 to bring a claim; and, when the Claimant asked about what he termed "a dispensation", he was told there was none. The Claimant told me that he simply could not afford tribunal fees at that time as he was without work and reliant on benefits. It is an agreed fact that he would have qualified for remission of fees but he said that this did not arise because he was unaware of this possibility.

11 The Claimant told me that he learned of the remission of fees scheme from a solicitor on or about 21 July 2017 and that within a few days of that he then heard about the abolition of fees following the announcement of the decision of the Supreme Court in the ***Unison*** case (this was on Wednesday, 26 July 2017). As I have already noted, this claim was presented to the Tribunal on 3 August 2017.

Findings of fact

12 I turn then to my findings of fact which I make on the balance of probabilities. The Claimant is a biologist: he worked in South East Asia for many years, returning to the United Kingdom in 2011. He is a married man with a young family. The Claimant is plainly aware of the existence of Employment Tribunals and became aware before 1 December 2016 of the requirement to engage in early conciliation through ACAS before commencing Tribunal proceedings. This is clear because he commenced early conciliation on 1 December 2016 precisely with a view to bringing such a claim.

13 I note in passing that the Tribunal's fee regime was introduced in 2013. It attracted comment in the press at the time. This was a year or two after the Claimant's return to the UK.

14 The Claimant's account of what he was told by ACAS during early conciliation is set out above. While I am surprised by the events the Claimant describes, I accept his evidence on the balance of probabilities as he raised a complaint to ACAS in July 2017 to this effect and it has not been refuted by ACAS. This provides some corroboration for his account. Further corroboration exists in the fact that the Claimant did not apply for remission of fees immediately after early conciliation even though he would have qualified

for it.

15 It was clear from the Claimant's evidence that he did not understand that the tribunal fee was payable in two parts, with an initial issue fee of £250. His bank statement for January 2017, which has been disclosed, shows that he had funds to pay the issue fee but not the full fees of £1,200. I bear in mind however that the lower figure would nevertheless have represented a substantial proportion of the running balance in the household bank account at that time.

16 The Claimant's evidence was that he regarded the information from ACAS as, to use his words, *"a brick wall"* effectively ending the possibility of a claim in the Employment Tribunal. He said that that is why he did not consider it further. I find, nevertheless, that there were several sources of information about fee remissions accessible to him, including the Government, Citizens Advice Bureau and ACAS websites, all of which are reasonably easy to navigate. I bear in mind that many litigants in person made applications for remission and many of these were successful in doing so. The Claimant had a computer with internet access at home so he had the means to discover this if he had looked. His point, to which I shall return in my conclusions, is that he was "put off the scent" by the information from ACAS.

17 The Claimant told me that, while he thought that an Employment Tribunal claim was no longer possible, he did not give up on the prospect of pursuing some other type of claim against the Respondent. He said that he researched and contacted solicitors who might be willing to consider his claim on a conditional fee basis with this in mind. As part of his evidence he has disclosed two sets of documents relating to his dealings with solicitors (thereby waiving privilege). The first is an assessment from Michael Lewin Solicitors dated 24 February 2017. This email sets out their decision to refuse to take his case on a conditional fee basis. It is notable that it begins with the words *"we write further to your recent enquiry regarding a claim against your employer"*. It also sets out under the heading *"time limits"* a series of warnings about strict time limits applying to the potential claims and suggests that the Claimant take alternative advice without delay. I pause to observe that the Claimant knew of the three months time limit which applies to Tribunal claims at this time. The Claimant told me that this email did not alert him to the fact that the solicitors might be referring to Employment Tribunal proceedings nor did he think to ask the solicitors about fee dispensation. This exchange took place during the primary limitation period (including the extension available under the early conciliation provisions).

18 The Claimant did not give up in his pursuit of some means of bringing proceedings against the Respondent and the second tranche of documents he disclosed starts on 11 July 2017. This is his correspondence with DAS Law, a firm of solicitors with whom he was put in contact by his household insurer when he became aware of the possibility of funding a claim under his household policy. The opening document at page 47 refers to *"your employment dispute"*. Subsequently the Claimant had discussions over the telephone with a Ms Patel who alerted him on 21 July 2017 to the possibility of applying for remission of fees. This conversation prompted his immediate complaint to ACAS in respect of the information he had been given during early conciliation. On 4 August 2017 he received a letter from a senior ACAS manager containing a statement of regret that he had felt let down by ACAS's service. By that time, however, the Claimant had already presented his claim.

19 I find that the Claimant did not apply for remission of fees on 21 July or on any of the days after that and that events took a further turn with the announcement of the ***Unison*** decision on 26 July 2017. I find on the balance of probabilities that the Claimant realised by 27 July 2017 that he need not pay fees at all given that the finding that they were unlawful.

20 I accept the Claimant's evidence that he posted his ET1 claim form to the Tribunal on 1 August 2017. It was received on 3 August 2017. I also accept his evidence that he had to use facilities at his local library to prepare his claim form and that he needed to obtain the envelope and stamp necessary to post a large enclosure and go to the Post Office to do this. In short, I accept that there were some practical arrangements that he needed to complete in order to present his claim.

Conclusions

21 I find on the balance of probabilities that the Claimant was misled by something the ACAS officer said during the course of early conciliation and because of this he did not consider at that time that he could afford to commence proceedings in the Employment Tribunal. I find this was an impediment to the Claimant bringing a claim at that time.

22 Where I have difficulty with the Claimant's case is the reasonableness of him remaining in a state of ignorance about the possibility of remission of fees for the length of time that he did. I accept that information given by ACAS, particularly to a litigant in person, will have a powerful effect but this is not a case where the Claimant simply gave up because of ACAS'S *"brick wall".* On the contrary, he continued to pursue his claim by seeking out solicitors who might accept it on a conditional fee basis. This course must, in my judgment, reasonably require a person to consider the basis of such a claim, where it will be brought and how. This leads a person back to the Employment Tribunal, which has exclusive jurisdiction in respect of such issues, and, therefore, back to the question of fees. This is plainly what the solicitors he consulted in February and July 2017 had in mind. A person in the Claimant's position should reasonably have made enquiries about how, at the very least, the fee was to be paid if not by him. A simple search on the internet would have revealed the solution which was an application for remission. Had the Claimant applied, remission would have been granted and the proceedings begun.

23 So, I find that the Claimant was reasonably ignorant of the steps that he could take to present a timely claim in the period immediately after early conciliation through ACAS. I do not find on the evidence, however, that it was reasonable for him to remain so in the period between January and July 2017. I find that it was reasonably practicable for him to have presented his claim within the ordinary time limit or, at the very least, within a short while after the expiry of the time limit. I accept that the Claimant did not have the funds with which to pay fees but this was an impediment which would have been overcome if he had applied for remission. It follows that I do not find that the Tribunal has jurisdiction to hear this claim because the first of the two requirements, reasonable impracticability, has not been met.

24 That finding disposes of this claim but I make the following findings in respect of the second issue should I prove to be wrong in my primary analysis. For the purposes of the question whether the claim was brought within a reasonable time of it becoming reasonably practicable to do so I shall assume that the relevant date of reasonable

practicability is either 21 July 2017 when the Claimant was told of remission by Ms Patel; 26 July 2017 when the ***Unison*** decision was announced; or 27 July 2017 when the Claimant was likely to have become aware of it. On any of these cases I find that the Claimant brought his claim within a reasonable time of it becoming reasonably practicable to do so. I do not accept Mr Caiden's submission that it is a matter of an hour or two to compose and decide to send a claim form instituting legal proceedings. A party is still acting reasonably if they take a short while to assimilate new information and prepare their case in light of it. I also accept that there were some practical steps the Claimant had to take in order to present his claim, attending the library, posting the document and such like. So, on these alternative facts, had the Claimant succeeded on the first limb of the test, I would have found that he acted within a reasonable time of it becoming practicable for him to present his claim.

Employment Judge Foxwell

3 January 2018