EMPLOYMENT TRIBUNALS

Claimant: Mr P Kirwan

Respondent: QED Scaffolding

HELD AT: Manchester **ON:** 5 October 2017

BEFORE: Employment Judge T Ryan

REPRESENTATION:

Claimant: Ms Ball, Partner, and Mr Ball, Father-in-law
Respondent: Mr R Lassey, Counsel

JUDGMENT

The judgment of the Tribunal is that:

1. The application for reconsideration of the rejection of the claim 2402010/2017 is granted pursuant to rule 13(1)(b) and the decision is revoked.

2. The claim is to be treated under rule 13(4) as presented on the date the defect was rectified namely 5 October 2017.

3. An extension of time is granted to permit the claimant's disability discrimination complaint to be determined.

4. An extension of time is not granted in relation to the complaints of unfair dismissal, failure to pay notice pay and failure to pay holiday pay.

REASONS

1. This preliminary hearing was ordered by Employment Judge ("EJ") Holmes when the matter came before him on 8 August 2017. As before EJ Holmes, Mr Lassey of counsel appears on behalf of the respondent and Ms Ball, who I understand to

be the claimant's partner, together with her father, Mr Ball, have appeared for the absent claimant, who I am told is unwell.

5. The issues I had to consider are set out clearly in the judgment of EJ Holmes on 8 August 2017, and they are:

   5.1. the claimant's application for reconsideration of the rejection of his claims;

   5.2. an application to amend the claim form in this case so that there is deletion of the word "No" in the tick box at section 2.3 and the insertion of an ACAS early conciliation certificate number R107852/17/17; and

   5.3. whether the tribunal has jurisdiction if the complaints in it are out of time, and if so, whether time should be extended.

6. I have seen a bundle of documents prepared by the respondent and in the course of the hearing I have obtained a number of documents from the Tribunal administrative staff in order to clarify the history of this unfortunate matter.

7. I say at the outset, the conclusion I reach I do so with some reluctance since I consider that clearly a substantial part of the reason why the claimant finds himself in the predicament that he does is because an earlier claim, which was not accepted by the Tribunal administratively, was eventually rejected in relation to compliance or non-compliance with the fees regime which since the presentation has been struck down by the Supreme Court as unlawful. What, in my judgment, is of assistance to the claimant is that I understand that those claims that fell by the wayside, as it were, for that reason are to be reinstated retrospectively by administrative action of some kind, and therefore insofar as I find that any parts of the claimant's case cannot proceed today they may in the future be resurrected and brought before the Tribunal for deliberation.

The Facts

8. The facts so far as I can ascertain them to be are as follows:

9. The claimant worked for the respondent for a little over two years and thus had acquired the right not to be unfairly dismissed.

10. He was dismissed on 9 December 2016. He alleges that was unfair, that he should have been paid notice pay, and he also makes allegations of disability discrimination.

11. He approached ACAS on 29 January 2017 and a certificate was issued dated 1 March 2017 which, it is common ground, is that same certificate, the number of which appears above.

12. On 10 March 2017 the claimant sent an online claim to the Employment Tribunal Central Administration Unit at Leicester. It is clear, because that document has been obtained, that in that claim, which is substantially similar to a later claim form, he put the ACAS conciliation number. It was not rejected for that reason.

13. It appears to me from the papers I have seen that he applied for help with fees at that point, because a claim had to be accompanied by a fee or an application for remission at that stage. The claim was rejected at that stage and he was sent a letter by the Administration saying that he was required to submit a "Help with Fees" form with proper information by 6 April 2017.

14. An email from the claimant, regrettably incorrectly addressed, dated 4 April 2017 at 7:02 has been produced before me. It gives the reference number that the claimant had received and in it the letter states, "I have completed an online application for help with Employment Tribunal fees" and gives his Employment Tribunal claim number, which is an eight digit number. That email, wrongly addressed, did not arrive with the Tribunal.

15. The need for that email, as I understand it from the administrative staff, is because when a "Help with Fees" online application is made it is stored in some electronic inbox somewhere and is not, as it were, taken out of there and processed until that email address receives an email of this kind from the prospective claimant.

16. There is no doubt that an email was sent as instructed by the tribunal to pursue the online application for help with fees. The correct email address for that is ethelpwithfees@hmcts.gsi.gov.uk. The address to which the claimant sent his email was to ethelpwithfees@hrmcts.gsi.gov.uk. It was wrong, I am sure, simply by slip or oversight. As a result of that the application for help with fees was treated as not having been made when the matter was considered administratively.

17. It appears from the Tribunal documents that that matter was apparent by 10 April 2017. The relevant document is marked "Closure 12 April 2017" and the case was progressed beyond that.

18. Ms Ball tells me that it was only on 17 April 2017 that this was discovered by the claimant when by communication when the matter, I suspect, was chased up. Therefore it was overnight on 17 April leading into 18 April that this second claim form was submitted online by the claimant.

19. Further and more regrettably perhaps was the fact that that claim form, like the first, required the claimant to state the ACAS early conciliation number. Unfortunately, in that section of the claim instead of doing that the claimant left blank the box in section 2.3 for the early conciliation number, having ticked the box to say "no", he did not have one. Then he ticked the box to say "my employer has already been in touch with ACAS". As a matter of fact it appears that the employer had been in touch with ACAS but not necessarily as a result of conciliation. At all events, I do consider that the claimant was seeking to mislead anyone by entering information in that way.

20. The claimant is not here to explain what happened. Ms Ball who, with her father and the claimant, tried to put the claim in, simply suggests to me that it was in their haste to do it that an error was made. It is not clear to me why such an obvious error should be made since the matter had been done correctly the first

time. When they were filling in that form they must have had access to the earlier certificate. However, I accept that an error was made.

21. Because the claimant had given that reason for not providing an ACAS early conciliation number, when the second claim was received it was not rejected by the Tribunal under rule 10 of the Employment Tribunals Rules 2013.

22. That rule provides that a claim must be rejected if it does not contain an early conciliation number or confirmation that it does not institute any relevant proceedings, or confirmation that one of the early conciliation exemptions applies.

23. However, when the matter came before EJ Holmes at the preliminary hearing he had regard to rule 12 which is headed "Rejection: substantive defects". That provides:

> **12.**—(1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—
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> …
>
> (c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
>
> (d) one which institutes relevant proceedings, is made on a claim form contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply…
>
> (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs …(c) or (d) of paragraph (1).

24. A claimant whose claim is rejected under rule 12 may apply for reconsideration. That is provided for by rule 13 as follows:

> **13.**—(1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—
>
> (a) the decision to reject was wrong; or
>
> (b) the notified defect can be rectified.
>
> (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.

25. I had some debate in the course of argument with Mr Lassey who submitted that rule that 12(1)(c) might apply. In my judgment that rule does not apply, but 12(1)(d) does.

26. When that matter came before EJ Holmes, he took the view that the claim had to be rejected for the reasons that he gives in his detailed judgment on 8 August 2017. He pointed out to the claimant that an application for reconsideration could be made. He explained that if that were granted the claim form could be amended at section 2.3, by the insertion of the certificate number.

27. EJ Holmes also raised the question of time, and the reason for that is as follows. Section 207B of the Employment Rights Act 1996 provides for an extension of time where the process of conciliation is entered into. Where time would expire, save for the extension, within the period of ACAS conciliation, then time expires

instead one month after day B; but where that does not apply then in deciding whether time has expired the days in conciliation, that is the day after day A up to day B, are to be ignored. Effectively those days are added on to the primary limitation period of 3 calendar months less one day.

28. What is the significance of that in this case?

29. The claimant was dismissed on 9 December 2016. Apart from conciliation time would expire on 8 March 2017. The claim was in conciliation for 31 days, and adding 31 days takes the limitation period to 8 April 2017. That, I note, is two days after the claimant should have provided the information about fees in the first claim, and some ten days before he did in fact put the claim in.

30. The application for reconsideration, in effect is an application to amend the claim form. It can be either treated as having been made before EJ Holmes on 8 August 2017 or by a separate application by the claimant in writing to the Tribunal on 18 August 2017. I do not think anything turns in reality on the difference between those two dates. The application was made some four months after primary limitation expired.

31. What then is the right approach to these applications? In terms of the first issue, the application for reconsideration, my attention was drawn by Mr Lassey to rule 13 the provisions of which I have set out above.

32. Mr Lassey pointed out that the application should be in writing. I do not believe, having regard to the overriding objective, whether the outcome turns upon whether the claimant had in fact applied in writing at the time of the last preliminary hearing. There is no true prejudice to the respondent, who knew this application was likely to be coming down the track, by that failure to comply with the rubric.

33. Mr Lassey takes the realistic point that the defect in relation to the ACAS conciliation information can be rectified by the amendment suggested by EJ Homes at paragraph 2 of the judgment of 8 August 2017.

34. I have no doubt that in the interests of justice, the defect not only can be rectified but in my judgment should be rectified.

35. That leads then to the question of what should happen to the claim.

36. I have considered with some concern the fact that the original claim, which was presented in substantially similar terms, foundered only because of failure to comply with the fee regime which has subsequently been struck down root and branch by the Supreme Court as being unlawful in its inception. If the fee regime had not existed that claim would have been accepted because it contained an ACAS certificate number and would have been served upon the respondent and then progressed.

37. However, the instant claim is to be treated as having been presented at the hearing, at the point when the rejection was reconsiderd and revoked. It is out of time for that reason.

I deal first with the complaint of disability discrimination. The test there for an extension of time is whether it would be just and equitable to do grant it on an application of the proper principles, namely the decision of the Court of Appeal in **Robertson v. Bexley Community Centre** [2003] EWCA Civ 576 and the earlier decision of the EAT in **British Coal Corporation v Keeble** [1997] IRLR 337.

38. The operation of the fee regime is a significant cause of the reason why the claimant now has to seek an extension of time. The first claim was clearly presented within time. The second claim was attempted to be presented, as soon as the claimant was aware that the first claim could not proceed. Whilst he clearly made an error in applying for help with fees I do not think that is a matter that should be held against him. It was a clerical error.

39. Entirely appropriately and recognising the claimant is a litigant in person and having taken instructions, Mr Lassey did not seek to persuade me against extending time for the disability discrimination claim to proceed. In my judgment to allow that extension of time would be just and equitable and I grant it.

40. Mr Lassey made a different submission, in relation to the complaints for unfair dismissal, notice pay and unpaid holiday pay.

41. Such complaints must be presented within a period of three months, that is three calendar months less one day. If they are not presented within that period the Tribunal has no power to extend time unless it is first satisfied that it was not reasonably practicable for the claimant to bring the complaint within that period. The Tribunal can only extend time for such period further as it considers reasonable.

42. Mr Lassey makes the point that the reason that this second claim is out of time was not because of the operation of the fee regime but the claimant's error in his attempt to obtain help with fees. He could, as he did, have presented a claim in time before 8 April 2017, which was when time expired after the conciliation period extension. He submits that the Tribunal should not look back and say it was not reasonably practicable because of that error on the part of the claimant. He submits therefore that there is no inherent injustice.

43. In my judgment that is a weak submission. It is effectively inviting me not only to ignore the history but to ignore the fact that the reason the claimant finds himself in this position at all is because the fee regime which has been struck down as unlawful was in operation. I reject that submission.

44. Mr Lassey then makes, in my judgment, a much stronger and more persuasive point. The operation of the fee regime takes the claimant to 18 April 2017. What it does not do is to take his extension of time, as not being not reasonably practicable, to 8 or 18 August. The reason for that is nothing to do with the fee regime save it is a background fact. He submits that once the first claim had been rejected it was still incumbent upon the claimant then to present the claim within time. Effectively he submitted, without making a specific concession, is that had the claimant presented the claim properly on 18 April 2017 when it was presented, with the ACAS certificate number, he could still have taken the time

point, but for the reason I have previously expressed it would be a much harder point to take.

45. The reason why this claim was not effectively presented and is only presented when the rectification occurs, and that is today, is for no other reason that the claimant, having obtained an ACAS certificate properly, told the Tribunal on presenting the second claim that he did not have one.

46. In those circumstances Mr Lassey submits, and I think there is force in the submission, the claimant cannot rely upon his own error in saying that it was not reasonably practicable for the second claim to be presented properly at that time. Put another way, Mr Lassey's alternative argument was, even if I were to hold it was it was not reasonably practicable for the claim to presented up until 18 April 2017, if the claimant then by his own error prolonged the time for presentation by several months thereafter he cannot say that it was presented within a further period which the tribunal could consider to be reasonable.

47. Whilst I had some hesitation initially in accepting this submission, on balance I am persuaded it is correct.

48. In the circumstances I find that the tribunal does not have jurisdiction to consider those additional complaints. I recognise that this appears harsh, but the effect is or will be ameliorated, as I have already indicated in my judgment, by the revival of the earlier claim. Thus while the claims of unfair dismissal and failure to pay notice pay and holiday pay may be delayed, they may nonetheless come before the Tribunal for determination.

49. So, in summary my conclusions are:

    49.1. that the application for reconsideration of the rejection of the claim 2402010/2017 is granted pursuant to rule 13(1)(b);

    49.2. the claim is therefore to be treated under rule 13(4) as presented on the date the defect was rectified;

    49.3. although the claim is out of time I grant an extension of time to permit the claimant's disability discrimination complaint to be determined; but

    49.4. I do not grant an extension of time in relation to the complaints of unfair dismissal, failure to pay notice pay and failure to pay holiday pay.

50. In the particular circumstances of this case I do not formally dismiss those complaints less that should give rise to an argument of estoppel. I simply hold that the tribunal has no jurisdiction to determine those complaints as presented in this claim form.

Employment Judge Tom Ryan

Date 22 December 2017

REASONS SENT TO THE PARTIES ON

4 January 2018

FOR THE TRIBUNAL OFFICE