EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4102260/17

Held in Glasgow on 20 October 2017

Employment Judge: J D Young (sitting alone)

Mr Godspower Ovieghara	**Claimant** **In Person**
Asda Stores Limited	**Respondents** **Represented by:** **Ms L Shaw - Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Judgment of the Employment Tribunal is that under Section 111 of the Employment Rights Act 1996 the Tribunal does not have jurisdiction to hear the claimant's complaint of unfair dismissal which is dismissed.

REASONS

1. In this case the claimant presented a claim to the Employment Tribunal on 1 August 2017 complaining that he had been unfairly dismissed by the respondents on 14 April 2017. The respondents in their ET3 response admitted dismissal on that date stating that the claimant`s employment had been terminated summarily for gross misconduct and denying that dismissal was unfair. It was also maintained by the respondents that the Tribunal had

no jurisdiction to hear the claim as it was not presented to the Tribunal before the end of the three month period beginning with the effective date of termination of the employment. It was noted that the claimant had contacted ACAS on 2 June 2017 and an Early Conciliation Certificate had been issued on 2 June 2017. It was maintained therefore that the last date for presenting the claim was 15 July 2017.

2. A Preliminary Hearing was arranged to determine the timebar issue and in particular whether it was "*not reasonably practice*" for the claimant to bring his claim in time pursuant to Section 111(2)(b) of the Employment Rights Act 1996 and if so whether it was brought within such further period as was reasonable in accordance with that section.

The Hearing

3. At the hearing the claimant produced two typed statements which related to the circumstances surrounding his dismissal and presenting his position as to why that was unfair. As explained to him at the time the purpose of the preliminary hearing was not to consider the merits of the application but to consider whether his claim could proceed given the statutory time limits which prevailed. It was agreed given the date of dismissal; date of receipt of the employment claim by ACAS and date of issue of the Early Conciliation Certificate on 2 June 2017 that to comply with time limits the claim should have been presented to the Employment Tribunal on 15 July 2017 rather than 1 August 2017.

4. At the Hearing I heard evidence from the claimant which it is useful to summarise. That evidence is considered in the conclusions as to whether it was not reasonably practicable for him to have lodged his claim by 15 July 2017.

Evidence of the Claimant

5. The claimant commenced employment with the respondents on 7 November 2014. He was employed in the freezer department. His employment was terminated on 14 April 2017. He states that he was "*sent home that day*". It was explained to him that he had a right of appeal against his dismissal and that appeal took place on 13 May 2017 but he was told that day it was unsuccessful.

6. He made no enquiry about his rights in relation to any claim to the Employment Tribunal prior to the appeal hearing. He considered that his appeal may be successful. He thought that a "*new person would be able to see what I did was reasonable*".

7. However, after the appeal was turned down he states that he was not "*in full control of myself*" and that he was in a state of "*not thinking right*". Apart from the shock of losing his job the reasons for this were:-

   (a) He is a father to two boys aged 2½ and 3½. His older boy had been attending professionals in child care in April 2017 on account of his behaviour. No diagnosis had been made at that time but he and his wife were concerned as to the position. In the course of time that son was diagnosed as being autistic but in the period April/October 2017 the behavioural issues had been of concern to him.

   (b) He had created a small charity in Nigeria around November 2016 which housed homeless children who were rescued from the street. He had been the sole funder and sponsor of the small school which had been created. He supplied approximately £70 per month for food/teaching staff and also some further funding for "*extras*". Losing his job meant that this enterprise was at risk and caused him distress.

8. The claimant "*felt unwell*" and attended his doctor in May 2017. Blood tests were taken in May and June 2017. The claimant was not diagnosed with

any condition. He was prescribed Paracetamol to take for some weeks. After the second blood test he phoned and was advised that he should make an appointment with his GP but by the date of the hearing he had not done so.

9. He advised that in May 2017 after the appeal he had attended the Citizens Advice Bureau and "*showed them my papers*". He was advised at that time that he had a claim and that he should make application to ACAS. At that time he was also conducting a job search. He advised that when he attended the Citizens Advice Bureau he was told that there were time limits with which he had to comply in making a claim to the Employment Tribunal.

10. He stated that he "*went to ACAS*" on 2 June 2017 and got a Certificate from ACAS. In cross-examination he was pressed as to whether he had given ACAS any time to resolve matters with the respondents given that according to the Early Conciliation Certificate the date of receipt by ACAS of the "*EC notification*" was 2 June 2017 and the date of the Early Conciliation Certificate by ACAS was also 2 June 2017. The claimant`s position was that he got in touch with ACAS on 2 June 2017 and been told by an officer of ACAS that the respondents had been contacted but there had been no response. The claimant then asked for the Certificate to be issued. He denied indicating to ACAS that he did not wish to spend time on possible conciliation and simply requested the Certificate. At the same time he indicated the CAB had advised him that the purpose of going to ACAS was *"really to get Certificate*".

11. He then researched the position online and found that there was a "*high cost to go to Tribunal – said would cost £1,200*". At that time he states he made contact with lawyers to establish if his case could be taken on a "*no win – no fee basis*"; However, he was unable to find such representation and was advised of the charge out rates which would be applicable by those he contacted. He stated he was unable to afford the fees. He advised that

his search for a suitable solicitor was online when he had "*Googled employment lawyers*". He had phoned those whose names had appeared.

12. He denied that either the CAB or any lawyers he had contacted had mentioned the availability of "*remission*" for payment of Tribunal fees. He had asked the lawyers he had contacted of the availability of legal aid and was told that they did not "*do legal aid*".

13. After the appeal hearing the claimant maintained that he considered that the time limit ran from that date and so he had until 10 August 2017 to lodge his claim. He did not make any enquiry as to whether his belief was correct.

14. He found employment through an agency from 1 June 2017 providing him with £200 per week take home pay. That employment was as a warehouse operative and had resulted in a contract through to 22 December 2017 at a rate of £300 per week. His wife was not working.

15. Accordingly his position was that he considered he had until 10 August 2017 to lodge his claim. He realised it was too expensive for him to do that but "*he hoped something would come up*". He then became aware through news reports around 26/27 July 2017 of the Supreme Court decision declaring the level of fees payable to Employment Tribunals to progress claims to be unlawful. That was then he realised he could make his application without payment of a fee and did so. He did not phone the Tribunal Office to make any enquiry but simply "*went online*" and posted his form to the address given.

Submissions

Claimant`s Submissions

16. It was submitted by the claimant that he simply wished justice and a fair hearing of his case. He felt that matters had not been properly considered by the respondents.

17. He submitted that with the help of the Supreme Court judgment on fees he should be allowed to submit his claim late and be able to have access to justice regardless of status.

18. If he had had the opportunity to bring his case earlier then he would have done so. However, he was unable to meet the payment of fees and justice would be done by allowing his claim in late.

19. He considered that this issue affected a number of people.

Submission for the respondents

20. For the respondents it was submitted that the claimant had not made proper enquiry to determine the time limit and it was reasonably practicable to do so. Also from the searches the claimant had made it would have been clear that remission from Tribunal fees would have been available. The evidence from the claimant that the CAB or none of the solicitors had mentioned remission was "*odd*".

21. It was submitted that had there been no Supreme Court decision then the claimant would have lodged his claim in August 2017 on his mistaken belief that the time limit would expire in August 2017. That lack of knowledge did not aid him in the matter.

Conclusions

22. In this case it is not disputed that the ET1 claim form by the claimant should have been presented to the Employment Tribunal by 15 July 2017 but was not in fact presented until 1 August 2017.

23. In those circumstances the issue is whether it was *"not reasonably practicable"* for the claimant to present the claim within the time limit. The onus of proving that presentation in time was not reasonably practicable rests on the claimant and that "*imposes a duty upon him to show precisely why it was that he did not present his complaint*" – ***Porter –v- Bandridge Ltd [1978] ICR 943***.

24. Even if a claimant satisfies a Tribunal that presentation in time was not reasonably practicable the Tribunal must then go on to decide whether the claim was presented "*within such further period as the Tribunal considers reasonable*" - (s111(2)(b) of Employment Rights Act 1996.

25. There have been some judicial attempts to establish a clear and useful definition of "*reasonably practicable*". In ***Palmer & Another –v- Southend-On-Sea Borough Council [1984] ICR 372*** the Court of Appeal reviewed the authorities and concluded that "*reasonably practicable*" does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like "*reasonably feasible*". In ***Asda Stores Ltd –v- Kauser EAT/0165/07*** Lady Smith explained that in the following words:-

> "*The relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."*

26. In this case the claimant referred to him being distracted and "*not thinking straight"* after his appeal was dismissed on 13 May 2017. That related to

the condition of his older son; that he could not support the charity in Nigeria as he had before due to lack of funds and he felt unwell. I could not consider that these factors made it "*not reasonably practicable*" to have submitted his claim form by 15 July 2017. His position was that he had attended the appeal in mid-May 2017 in the hope that that appeal would be successful on a fresh look at matters by the respondents. When that was not the case he then sought advice from the Citizens Advice Bureau. So clearly any distraction did not prevent him from seeking advice on his position at which time he was also told of time limits regarding application to the Employment Tribunal. The CAB also told him that it would be necessary to involve ACAS in the Early Conciliation procedures and he took that step. I do not consider that any distraction prevented him from making his claim to the Employment Tribunal.

27. The Early Conciliation Certificate indicates that ACAS received notification of the claim on 2 June 2017 and issued the Certificate on the same date. That was a very short timescale for any conciliation procedure to be adopted. It did appear that the claimant may well have not wished to enter into any conciliation process and simply advised ACAS that he wanted a Certificate to be issued. The claimant`s evidence was not that the respondents had refused any conciliation process but simply that an officer from ACAS had got in touch with the respondents but there had been no response. However I do not consider that the issue of whether or not the claimant gave any time for conciliation to be effected or simply advised ACAS that he did not wish to enter any conciliation process affects the question of reasonable practicability. The claimant was still aware that he required to comply with the time limits.

28. The claimant maintains that he believed the time limit would run from the date of dismissal of his appeal and that he had in fact until 10 August 2017 (by his calculation) to lodge his claim. This is not a case where the claimant

is stating that he was unaware of his rights or ignorant of the time limit. Where a claimant knows of his or her rights to complain of unfair dismissal he or she is under an obligation to seek information and advice about how to enforce that right. In ***Sodexo Healthcare Services Ltd –v- Harmer EATS/0079/08*** a claim for unfair dismissal was submitted 23 days beyond the time limit because the claimant wrongly assumed that the time limit in respect of her claim would not start running until the end of the appeal process. The EAT decided that the crucial question for the Tribunal was whether in the circumstances the employee was reasonably ignorant of the time limit. Given in that case that the claimant knew of the time limit and she had failed to make proper enquiries about it, the only answer to the question whether she was reasonably ignorant of the start date of the time limit was "*No*". The claim was dismissed.

29. In this case there is no evidence that the claimant was misled into thinking that the time limit ran from the date of the appeal. It was not his position that he had been so advised by the CAB or any other adviser that was the case. He had seen the CAB after the appeal was turned down. There was no evidence that the respondents had in any way misled the claimant to believe that the time limit would commence from the date of the appeal. The ET1 lodged by the claimant was clear in indicating that his employment terminated as from 14 April 2017 rather than the date of the appeal. He was not encouraged into any belief that the time limit ran from that date of the appeal. In those circumstances I could not accept that even if the claimant believed (a) that his dismissal would not come into effect until such time as the appeal was heard and dismissed and (b) that he had three months from that date to lodge his claim, that was reasonable. The claimant had been active in seeking advice from the CAB and received advice on time limits. Such advice would be available from ACAS who he had contacted. He had researched online in the hope of finding suitable lawyers and spoken with some. He had ample opportunity to make enquiry as to the position and correct any erroneous self belief.

30. That would leave as a reason for failure to lodge the claim in time that he found the fees payable to be prohibitive. This issue of course is rather clouded by him maintaining that he thought he had until 10 August 201 to lodge his claim. His further position is that within that time period he *"hoped something would come up*" which would enable him to lodge his claim and that "*hope*" turned into reality when the Supreme Court issued its decision on the fee regime which enabled him to lodge the claim. In this respect the issue of him being able to obtain "*remission*" from fees is a potent factor.

31. As was pointed out the availability of remission from fees was very much to the fore in any online research over May/June 2017 into applications to the Employment Tribunals. The fee regime and availability of remission from fees is well known to advisers at the Citizens Advice Bureau. The claimant maintained he had not received any advice from the Citizens Advice Bureau about remission from fees payable. He states that he did not know of the possibility of remission. I find it hard to accept he would not have been advised both of the fee regime and the availability of remission by the CAB. I find it hard to accept that he would not have come across the availability of remission within the online research he stated that he had undertaken on application to the Tribunal. The possibility of remission from fees is well explained there. It is not at all difficult to find the application form for remission. The financial limits are stated there as is the possibility of partial remission. It is also the case that he spoke with lawyers who provided employment advice and the discussion related to the issue of costs and I find it hard to accept that there would have been no mention of the issue of remission from payment of fees to the Tribunal. The availability of information on remission for fees is widespread and certainly in my view sufficient for the claimant to have been aware of that possibility.

32. It is not the claimant's case that he made enquiry about remission and found that he was not entitled. He simply states he was unaware of the availability of relief from payment of those fees. The procedure for a remission claim

would be for a claimant to lodge his ET1. He would then have 7 days to submit the form to the Tribunal office which sought remission from fees.

33. Once the application for remission was lodged within the 7 day period then it would be processed to establish whether or not remission or partial remission was appropriate. If remission was refused a claimant is given the opportunity to appeal or pay the initial fee. Failing appeal or payment of the fee or appeal and that appeal being refused, then the claimant would be advised that the application could not proceed.

34. Accordingly if the claimant in this case had lodged his claim timeously and had made an application for remission for fees within the 7 day period allowed then he would have been in time. It would appear given that his wife was not working and the level of his income at the relevant time in June 2017 that he would have obtained remission. The monthly income level for a claimant who was married with 2 children ran at the rate of £1,735 per month. From the information available it would appear that the claimant`s income would be well below that amount.

35. In those circumstances it would be my view that it would be reasonably practicable for the claimant to have lodged his ET1 application form timeously. He would then have 7 days within which to make his application for remission. As indicated it is very possible that application would have been successful or at least there may have been partial remission which could have been affordable.

36. Given the absence of lodging of the claim timeously and any steps to seek remission from fees I do not consider that it was “not reasonably practicable” for the claimant to have lodged his claim in time. I could not accept that the belief that the time limit ran from the date of the appeal could provide an excuse for the claimant. Failure to lodge the claim and seek remission from fees was also a step which was possible and it was

reasonable given the wide availability of advice for the claimant to have taken that step at the appropriate time.

Employment Judge: JD Young
Date of Judgment: 08 November 2017
Entered in register: 10 November 2017
and copied to parties