EMPLOYMENT TRIBUNALS

Claimant: Ms Carol Ashby

Respondent: Retirement Security Limited

Heard at: **Birmingham** **On:** **5 February 2018**

Before: **Employment Judge Benson**

Representation
Claimant: Mr M Stephens - Counsel
Respondent: Mr D Smith - Consultant

RESERVED JUDGMENT
ON A PRELIMINARY ISSUE

The Employment Tribunal has no jurisdiction to hear the Complainant's complaint of unfair dismissal. It was reasonably practicable for the complaint to be presented within the statutory time limits set out in Section 111(2) of the Employment Rights Act 1996 and it was not so presented. The claim is dismissed.

REASONS

Issues

1. The issue which I am to determine is whether the claim of unfair dismissal was presented within the requirements of s111(2) of the Employment Rights Act 1996 (ERA). It was agreed that the limitation date was 18 October 2017.

Evidence and Submissions

2. I heard evidence from Mr M Hornsby, the solicitor who had conduct of this matter and I heard submissions from Mr Stephens and Mr Smith. Mr Stephens also provided written submissions.

Findings of Fact

3. Mr Hornsby is an experienced employment solicitor, qualifying in 1998. Since 2004 he has specialised in employment law and his practice is exclusively in that area of law. He acts predominately for Respondents.

4. Prior to the advent of fees in July 2013, it was permissible to present claims to the Tribunal by email. Within the 2013 Rules of Procedure and Presidential

Practice Direction this changed and presentation by email was no longer one of the permissible methods. During the period 2013 to 2017, Mr Hornsby had prepared claim forms on line but had then left it for the Claimant to submit the final page which required payment of the fee. In July 2017 fees were abolished and this was the first claim which Mr Hornsby had presented since then. He therefore prepared the claim form and on 13 October 2017 called the Birmingham Tribunal office to check whether the form could be submitted by email. The Tribunal clerk who he spoke to confirmed that was acceptable and Mr Hornby checked with them the correct email address.

5. Mr Hornsby submitted the claim form by email at 15.34 that day. He requested that the Tribunal communicate with him by email and provided his email address. He received the standard email acknowledgment. On 19 October he received a letter by post, rejecting the claim on the grounds that it had not been submitted by one of the three prescribed methods, being the online submission service; by post to the Employment Tribunal Central Office or by hand to one of the designated tribunal offices. He immediately attended the Watford Tribunal office and hand delivered the claim form and additional documents including a letter explaining what had happened and applying for an extension of time.

The Law

6. I set out the law which is relevant to my decision below:

7. **The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013:**

Delivery to the Tribunal
Rule 85.—(1) Subject to paragraph (2), documents may be delivered to the Tribunal—
(a) by post;
(b) by direct delivery to the appropriate tribunal office (including delivery by a courier or messenger service); or
(c) by electronic communication.
(2) A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8.
(3) The Tribunal shall notify the parties following the presentation of the claim of the address of the tribunal office dealing with the case (including any fax or email or other electronic address) and all documents shall be delivered to either the postal or the electronic address so notified. The Tribunal may from time to time notify the parties of any change of address, or that a particular form of communication should or should not be used, and any documents shall be delivered in accordance with that notification.

Irregularities and non-compliance
Rule 6. A failure to comply with any provision of these Rules (except rule 8(1), 16(1), 23 or 25) or any order of the Tribunal (except for an order under rules 38 or 39) does not of itself render void the proceedings or any step taken in the proceedings. In the case of such non-compliance, the Tribunal may take such action as it considers just, which may include all or any of the following—
(a) waiving or varying the requirement;
(b) striking out the claim or the response, in whole or in part, in accordance with rule 37;
(c) barring or restricting a party's participation in the proceedings;
(d) awarding costs in accordance with rules 74 to 84.

Presenting the claim
Rule 8(1): A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule.

10. **The Presidential Practice Direction – Presentation of Claims** states at paragraph 4:

    Methods of starting a claim
    A completed claim form may be presented to an Employment Tribunal in England & Wales:
    Online by using the online form submission service provided by Her Majesty's Courts and Tribunals Service, accessible at **www.employmenttribunals.service.gov.uk**;
    By post to: **Employment Tribunal Central Office (England & Wales), PO Box 10218, Leicester, LE1 8EG**.
    A claim may also be presented in person to an Employment Tribunal Office listed in the schedule to this Practice Direction.

11. I have considered the authorities to which I have been referred including: Matthews v Solus (London) Limited UKEAT/0395/10 and Dedman v British Building & Engineering Appliances [1974] 1 W.L.R. 171

12. From the relevant case law there are three general rules to which I have had regard:
    a. S111(2) ERA should be given a liberal construction in favour of the employee.
    b. What is reasonably practicable is a question of fact and for the Tribunal to decide.
    c. The onus of proof that it was not reasonably practicable lies with the Claimant.

Decision

13. Mr Stephens put forward a number of arguments as to why I should allow this claim to proceed. I will deal with each of them in turn:

14. The Presidential Practice Direction of 14 December 2016 sets out three methods by which a claimant *may* present a claim. Mr Stephens submits that the use of *may* is permissive rather than prescriptive. He suggests that there is therefore a tension or ambiguity between Rule 85(2) which uses the imperative *may only*, and as such in order to resolve this ambiguity consideration should be given to the overriding objective and primacy should be given to the Rule 85 which at Rule 85(1)(c) refers to '*by electronic communication'*.

15. In considering this argument, on the face of it the definition of the word *may* appears to have permissive meaning but it is essential to look at its context. It appears in a legal context within the Practice Direction and indeed is also used with Rule 85 itself. If there was no restriction as to how a claim might be filed there would be no requirement for the Practice Direction itself. That cannot be the position. I accept that although the word '*may*' has different meanings, the context in which it appears in the Practice Direction is entirely clear and unambiguous and as such email is not a prescribed method of commencing a claim.

16. Mr Stephens second argument was that non-compliance with Rule 85 or the Practice Direction does not render the proceedings void and as such the Tribunal may waive or vary any such requirements under its powers within Rule 6(a).

There are however exceptions within Rule 6, one of which is Rule 8(1). Mr Stephens has sought to persuade me that the exception does not apply to Rule 85 and it relates specifically to Rule 8(1). I cannot agree with this. Rule 8(1) is concerned with presenting a claim and states it shall be in accordance with any practice direction made under Regulation 11. Rule 85(2) also refers to the practice direction issued under Regulation 11. There is only one practice direction relating to the presentation of claims. I cannot therefore accept Mr Stephen's argument that the failure by Mr Hornsby to send the claim form in one of the ways prescribed in the Practice Direction does not render the proceedings void and as such I can vary the requirement to send it by that method under Rule 6(a). Rule 85 and the Practice Direction provide certainty as to how to present a claim and Rule 6 does not provide me with the power to vary that position.

17. Mr Stephens also sought to argue that by reasons of Rule 85(3) the automatic response from the Tribunal on 13 October acknowledging receipt of Mr Hornby's email was deficient in that it should have said that presenting a claim by email was not acceptable. Mr Stephens also suggested that Rule 85(3) provided the right for the Tribunal to allow a party to not adhere to the Rule 85(1) and (2) and by the Tribunal clerk's confirmation that email was sufficient and then the acknowledgement of 13 October, the Tribunal was exercising its power under Rule 85(3). I expressed to Mr Stephens in the hearing my difficulties in following that argument. The reading of that rule is clear; it relates to correspondence with the Tribunal after the claim has been presented. It is not in my view seeking to allow Tribunal staff to override the Presidential Practice Direction.

18. I come to Mr Stephen's final argument: that it was not reasonably practicable to present the claim by a different method before the limitation date. I was referred to the case of Matthews v Solus (London) Limited and in particular the reference to the judgment of Brandon LJ in Wall's Meat Co Limited v Khan [1979] ICR. He referred to the passage in which his Lordship states:

    'the performance or an act, in this case the presentation of a complaint is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with or inhibits performance. The impediment may be physical, for instance the illness of the complainant or a postal strike or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to essential matters. Such states of mind can however only be regarded as impediments making it not reasonably practicable to present a claim within the period of three months if the ignorance on the one hand or mistaken belief on the other is reasonable. Either state of mind will, further, not be reasonable if it arises from the complainant in not making such inquiries as he should reasonably in all the circumstances have made or from the fault of his solicitors or other professional advisers in got giving him such information as they should in all the circumstances have given him'

19. There are further passages which confirm that the key issue is whether the ignorance or mistaken belief in each case is reasonable. The distinction between the claimant in the Matthews case and this present claim is that Mr Matthews was not represented by a solicitor. Was it therefore reasonable for Mr Hornsby to have made the mistake of sending the claim form by email to the Tribunal office? There are numerous cases in which solicitors have made mistakes when presenting claims. The principles are well established. Where an employee has retained a solicitor to act, and fails to meet the deadline because of the solicitor's fault, it will be difficult to say that it was not reasonably practicable to present the claim in time. Lord Justice Underhill in Northampton County Council v Entwhistle 2010 IRLR 740 EAT did however accept that here could be exceptions to this principle such as situations where the adviser's failure to give the correct advice could be reasonable.

20. Mr Hornsby is an experienced employment solicitor. Although he explains that he wanted to check the position because this was the first claim he had presented following the abolition of fees, it would have taken a simple look at the 2013 Rules and Practice Direction or in fact the Tribunal website to confirm how the claim could be presented and that email was not one of the prescribed methods. It was not reasonable in my view for him to have simply relied upon a clerk within the Tribunal office to confirm the position to him. I am sympathetic and understand how and why he took the steps that he did but unfortunately the authorities are against him. Once an employee instructs a solicitor to act it is incumbent upon that solicitor to ensure that he knows when and how a claim should be presented. I cannot therefore say that it was not reasonably practicable for the claim to have been presented in time.

21. I am also sympathetic to the Claimant and Mr Hornsby in that had the Tribunal adhered to Mr Hornsby's request to communicate by email, he would have been aware of the rejection in time for him to remedy the mistake. I have considered whether this would make any difference to the question of whether the mistaken belief was reasonable, but I cannot say that it does. It was Mr Hornsby's original mistaken belief which was the problem. He may have been lucky had the Tribunal emailed him to let him know of the rejection but that doesn't impact upon his original mistake.

22. Regrettably therefore I conclude that the claim was not presented in time in circumstances where it was reasonable practicable to do so. The Tribunal therefore has no jurisdiction and the claim of unfair dismissal is dismissed.

Employment Judge Benson

18 March 2018

Notes

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.