EMPLOYMENT TRIBUNALS

Claimant: Mr A Peverley

Respondent: Autism Initiatives UK

HELD AT: Liverpool **ON:** 12 February 2018
& 3 April 2018
(In Chambers)

BEFORE: Employment Judge Shotter

REPRESENTATION:

Claimant: Mr S Taylor, friend
Respondent: Mr J Keeble, Solicitor

JUDGMENT

The judgment of the Tribunal is that:

1. The claimant's claim received on 22 October 2017 comprising of automatic unfair dismissal for making a protected disclosure under Section 103A of the Employment Rights Act 1996 and unfair dismissal under Section 98 for failure to allow the claimant to be accompanied at a disciplinary hearing were not presented to the Employment Tribunal before the end of three months beginning with the effective date of termination on 24 May 2017.

2. The Tribunal is satisfied that it was reasonably practicable for the complaints to be presented before the end of that period of three months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaints, which are dismissed.

REASONS

1. This is a Preliminary Hearing to consider the respondent's application to strike out the claimant's complaints of unfair dismissal brought under Section 98 of the

Employment Rights Act 1996 and automatic unfair dismissal brought under Section 103A of the Employment Rights Act 1996.

2. It is disputed by the claimant the effective date of termination was 24 May 2017 when the claimant (whose employment commenced as a Support Worker on 8 March 2016) was dismissed summarily. The claimant, alleges he was denied the statutory right to be accompanied at the disciplinary hearing which took place on 24 May 2017, and then automatically unfairly dismissed for making a protected disclosure on or around 5 May 2017 concerning alleged actions towards a service user. The claimant denies receiving and/or reading the email dismissing him summarily on 24 May 2017.

3. The respondent maintains the claimant was fairly dismissed for gross misconduct having allegedly used unauthorised restraint on a service user, following an investigation and a disciplinary hearing.

4. The Tribunal heard oral evidence from the claimant under oath concerning the effective date of termination, which it did not find credible for the reasons set out below. It did not accept the claimant had made the decision not to open the 24 May 2016 email attaching the disciplinary outcome letter sent to his computer after the hearing.

The law

5. In respect of unfair dismissal claims, the general rule is set down in S.111(2)(a) ERA, which provides that the time for presenting an unfair dismissal claim runs from the *effective date of termination* (EDT). When a claim is to be presented within a period 'beginning' with a particular date — e.g. the time limit for unfair dismissal claims, which begins with the EDT — that date must be included in the calculation of the time allowed — Hammond v Haigh Castle and Co Ltd]1973] ICR 148, NIRC. So a period of three months beginning with 24 May 2017 ends on 23 August 2017, this is the primary limitation period which may then be extended as a result of ACAS early conciliation depending on the circumstances.

6. The limitation period applicable to a complaint of unfair dismissal is set out in section 111 of the ERA, which provides (so far as material): "111. *Complaints to employment tribunal*
(1) A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.
(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.

7. In University of Cambridge v Murray [1993] ICR 460, EAT, the EDT was 30 April 1991. The claimant presented a complaint to a Tribunal on 30 July 1991. The EAT upheld the Tribunal's finding that the complaint should have been presented on

29 July 1991 and, in doing so, reiterated a number of well-established principles governing the calculation of time limits for unfair dismissal claims. It began by noting that in regard to any statutory time limit two questions must be determined. First, how is the period to be computed, paying particular regard to the fact that the calendar months are of different lengths? Secondly, given a starting date, does the starting date count as part of the period or is it excluded? The EAT decided that, when computing the relevant period, the proper approach is to look at the corresponding date — i.e. the day with the same number as the EDT — in the relevant later month. Turning to the second question, the EAT noted that it is well established that where the relevant statute uses the term 'from' or 'after', then the starting date is not included in the relevant period. However, the expression in S.111(2) ERA, which governs time limits in unfair dismissal claims, is 'beginning with'. The starting date is therefore included in the period and it is necessary to count back one day to establish the final date on which a claim can be presented.

8. The normal time limit for bringing unfair dismissal claims may be extended as a result of mandatory 'early conciliation' which came into force on 6 April 2014 and allows for a suspension of three month time limit in unfair dismissal cases while ACAS attempts to conciliates the dispute before the claim is presented to the Tribunal. - see S.18A of the Employment Tribunals Act 1996. ACAS generally has generally has up to a month to attempt to resolve the dispute, although this period can be extended by an additional two weeks if it considers that there is a reasonable prospect of achieving a settlement. If the parties do not want to take up the offer of conciliation, or conciliation ends without an agreement having been reached, ACAS issues a certificate to the claimant as proof that of contacted ACAS about early conciliation. It is only once the claimant has received the certificate that he or she is allowed to present a tribunal claim.

9. In relation to early conciliation, when determining whether a time limit has been complied with, the period beginning **the day after the early conciliation request is received** by ACAS, (in the claimant's case on 24 August 2017, the day after the primary limitation period expired) up to and including the day when the early conciliation certificate is received or deemed to have been received by the prospective claimant is not counted — S.207B(3). The clock will stop when ACAS receives the request and starts to run again the day after the prospective claimant receives the certificate.

10. The time limit for bringing the claim will be 'stopped' at the point in time when ACAS receives the early conciliation request and will only 'resume' when the claimant receives (or is deemed to receive) the early conciliation certificate, and as a result of the fact the claimant first made contact with ACAS on 24 August 2017 the clock could not be stopped because he was outside the limitation period. With relation to claimant's who enter the early conciliation process close to the end of the limitation period another extension of the time limit provision was added to ensure that claimants have at least one month from when they first receive the certificate to submit their claim. Despite the claimant's arguments to the contrary, he cannot take advantage of this as he failed to contact ACAS before the primary limitation period ended.

The evidence

11. It is not disputed the claimant did not contact ACAS for early conciliation purposes until 24 August 2017 outside the three-month time limit for presenting the unfair dismissal complaint. ACAS issued an early conciliation certificate on 24 September 2017 and the claim form was received on 22 October 2017.

12. In the claim form the claimant accepted his employment ended on 24 May 2017. The claimant did not attend the 24 May 2017 disciplinary hearing, having chosen not to do so. It is notable following the claimant's suspension on full pay he took legal advice. The claimant was aware the disciplinary hearing was convened to consider a serious allegation where one possible outcome was his dismissal. The Tribunal was referred to an email from the claimant sent 18 May 2017 to the respondent prior to the 19 May disciplinary hearing referred to the letter of invite to the disciplinary hearing dated 11 May 2017 (which the Tribunal also considered) and the following: "It is clear to my employment solicitor and I that you intend to rely on witness statements from the following support staff". The claimant set out the names of the staff and requested disclosure of various documents.

13. There was an issue concerning availability of the colleague who was to accompany the claimant at the disciplinary hearing, which resulted in the disciplinary hearing being adjourned to 24 May 2017. There are numerous emails exchanged between the claimant and respondent concerning the forthcoming disciplinary hearing. One email sent on 16 May 2017 the claimant wrote "please to be advised that I meet with my employment lawyer tomorrow 17 May 2017 at 1pm to discuss the disciplinary/documentation pack that you sent me …" The exchange of emails was the accepted mode of communication between the parties due to problems the claimant had encountered previously with the post.

14. It is clear from the contents of the claimant's emails he was in a position to respond cogently to the allegations. For example, in an email sent 22 May 2017 the claimant referred to the ACAS Code of Practice and written statements, he also referred to the proceedings "causing me and my family…much disruption, stress and worry…may I suggest that we have witnesses attend the hearing in stages over a two to three-day hearing." There as no suggestion by the claimant that he had mental health issues and was suffering from a depression so debilitating it prevented him from taking part in the process.

15. Following the disciplinary hearing the claimant was sent an email at 12.51 on 24 May 2017 which attached a letter dated 24 May 2017 terminating his employment on the grounds of gross misconduct summarily.

16. Given the fact the claimant had been actively involved in the disciplinary process, he had incurred the cost of instructing an employment lawyer, he had drafted and sent a number of emails and was fully aware on 24 May 2017 there was a real risk of his dismissal, the claimant's evidence before this Tribunal that he did not access or read the email on the day of the disciplinary hearing was not at all credible given the contemporaneous documentation and the importance of the disciplinary allegations to the claimant, so much so, that he had taken the step of

incurring costs and instructing an employment solicitor. The Tribunal did not accept the claimant chose not to read the email until 27 May at 8.13 pm when he received a hard copy of the letter through the post; this version of the events made no logical sense. The claimant gave oral evidence that there were difficulties with him receiving post at his home address; it was frequently lost or sent to another address hence his communications with the respondent by email. The Tribunal did not find it credible that the claimant would wait until he received a hard copy of the 24 May 2017 letter before reading the email in the full knowledge that the respondent would have emailed him, as they had done previously on numerous occasions.

The claimant's medical evidence

17. The claimant produced medical records during this Preliminary Hearing marked "C1" and "C2" in support his oral evidence that he was "in such a depressive state" he was unable to function or concentrate during this period. The claimant maintained he went to his GP on 19 June 2017 before the appeal hearing (which the claimant attended) and his depression and anxiety were "very high".

18. The Tribunal considered the claimant's medical records during this period running to pages 6 of 6 at great length, concluding they do not reflect the claimant was diagnosed with depression. The earliest reference to a "stress related problem" was made in 18 January 2018 which referred to the claimant's history and being "under a lot of stress last year, from job situation and also undergoing urology." In the 8 January 2018 record there was a reference to a stress related problem and under history it was recorded "…Waiting for a Tribunal…feels cannot concentrate...anxious about job situation". In short, there is no medical evidence to support the claimant's contention that he was suffering from depression and thus unable to make contact with ACAS and then issue Employment Tribunal proceedings within the statutory limitation period.

19. The claimant was invited to explain the omission in his medical records, and he provided an explanation that had no merit, the claimant being of the view that the word "depression" was not referred to because the GP "didn't feel it necessary…when you are anxious, you are going to get depressed" and the Tribunal was invited to accept this proposition, which it did not given there was no supporting medical evidence.

The claimant's fist contact with ACAS

20. The claimant gave oral evidence that he had consulted with ACAS some "two or three weeks before the 24 August 2017, had spoken to the Employment Tribunal on "two or three occasions" and he had been advised by both advised to submit his claim form "not beyond the 24 October" with the result that his claim should have been in time, and if it was not then this was down to other people badly advising him. The Tribunal did not consider this evidence to be credible, bearing in mind the claimant received advice from an employment lawyer before and after 24 May 2017. The claimant accepted documents had been drafted on his behalf with the benefit of legal advice, and the claimant's appeal letter dated 1 June 2017 confirmed "I would like to challenge the decision to terminate my employment, **which was notified to me on 24 May 2017** [my emphasis]. Given this confirmation as to the date the

claimant was "notified" despite his evidence before this Tribunal, and given the contents of the GP records, it was not credible the claimant was so incapacitated that he was not able to read the dismissal letter when it was emailed to him on 24 May 2017, (a letter which he accepted in the appeal letter dated 1 June 2017 as to having received notification on that date) and was too unwell on 23 August to approach ACAS for early conciliation, having attended at his appeal hearing at which he took part and make contact with ACAS on 24 August 2017.

21. Having heard oral evidence from the claimant, and considered the documents within the bundle to which the Tribunal was taken together with oral submissions from both parties, as a reasonable adjustment at the claimant's request, the Tribunal adjourned the hearing in order that the claimant could deal with the respondent's submissions and references to case law. It was agreed between the parties that the Tribunal would, having heard the oral submissions, come to a judgment after considering the claimant's written representations delivered by hand to the Liverpool Employment Tribunal on 27 February 2018, which it did after forwarding them to the respondent. The Tribunal does not intend to repeat the submissions made nor make reference to all of the case law it was referred to; it has however taken all of this into account.

22. The claimant in his written submissions dealt with Gisda Cyf -v- Barratt [2010] UKSC 41, referred to the Tribunal on behalf of the respondent. In short, the Supreme Court found that if the employer chooses to communicate the summary dismissal by post rather than a face-to-face interview, until the employee either knows of the dismissal or has a reasonable opportunity to learn of it, it will not be effective.

23. It is not disputed between the parties that the effective date of termination was when the claimant actually knew of the decision or had a reasonable opportunity of discovering it had been established. The claimant agreed with the respondent's submission that "whether the claim for unfair dismissal is out of time depends on whether the claimant read the dismissal letter of 24 May 2017. If he read it on 24 May 2017 his claim is out of time. If he read it on 25 May 2017 or thereafter his claim is in time". This is the nub of the claimant's case.

24. The claimant submitted that since the respondent sent the dismissal letter of 24 May 2017 using normal post office services, he could not possibly have received it on that date. It was not received until 27 May 2017, therefore his claim was within time. As indicated above, the Tribunal found the email and attached letter of dismissal sent 24 May 2017 was read by the claimant on 24 May 2017, and as a consequence the effective date of termination was 24 May 2017 and the claim had been lodged outside the three months statutory period. In short, at 12.51 on 24 May 2017 the claimant actually knew of the decision to summarily dismiss him and in the alternative, given the problems he had encountered with mail being delivered to his home address and usual mode of communication via email between him and the respondent, the claimant had a reasonable opportunity of establishing what transpired at the disciplinary hearing by clicking on the sent email to him at 12.51 following the hearing. However, for the reasons set out above, the Tribunal finds the claimant read the email on 24 May as set out in the claimant's letter of appeal when

he indicated the decision to terminate his employment had been notified to him on 24 May 2017.

25. It was not disputed that a complaint that an employee has been dismissed for making a protected disclosure, in common with other kinds of unfair dismissal complaints, must be presented to the Employment Tribunal before the end of three months beginning with the effective date of termination – Section 111(2)(a) ERA. Tribunals have discretion to extend the time limit for a reasonable period if the claimant can show that it was not reasonably practicable to present the claim in time – Section 111(2)(b).

26. On behalf of the respondent the Tribunal was referred to Palmer and Another -v- Southend on Sea Borough Council [1984] 1RLR 119 in which the Court of Appeal construed the words reasonably practicable to something to "mean the equivalent of reasonable and what is reasonably capable physically of being done. It is perhaps to read the word practical as equivalent to feasible .. Was it reasonably feasibly to present the complaint to the Employment Tribunal within the relevant three months".

27. The burden of proof of for establishing that it was not reasonably practicable rests with the claimant, and the claimant for the reasons set out above has failed to discharge that burden. It is notable the claimant does not deal with the case law cited by the respondent at the hearing in his written submissions with reference to reasonably practicability but nothing hangs on this failure. The Tribunal found as a matter of fact bearing in mind the claimant's input into the disciplinary process, his ability to respond to emails and draft communications including the letter of appeal, he has failed to establish it was not reasonably practicable for him to make contact with ACAS. In fact, he was well enough to attend at and presented his appeal, and made contact with ACAS on 24 August 2017. There was no evidence before the Tribunal from which it could conclude that it was not reasonably practicable for the claimant to comply with this statutory time limit. In particularly there was no medical evidence whatsoever to the effect that the claimant was too depressed/or incapable too commence the conciliation process with ACAS on 23 August 2017 as opposed to the 24 August 2017, the next day. There was also no credible evidence the claimant had been incorrectly advised of the primary limitation period.

28. It is unfortunate the Claimant was a day late and thus he was unable to take advantage of the time extension provided by Section 207B to facilitate conciliation before institution of proceedings. The Tribunal was reminded the time limits in employment cases are generally strictly enforced, and the power to disapply the statutory period is very restricted, as set out by the Court of Appeal in London Underground Limited -v- Noel [1999] IRLR 625 to which the Tribunal was referred on behalf of the respondent.

29. The Tribunal has not dealt with the claimant's submissions referring it to the "general law of contract" and the cases referred to at paragraphs 38 onwards in the claimant's written submissions as these do not go to the key issue in the case, which was whether or not the claimant read the email of 24 May 2017 and if so, whether it was reasonably practicable for him to have lodged his claim within the statutory period. Having applied the formula related to time limits in unfair dismissal claims,

the Tribunal is satisfied that it was reasonably practicable for the claimant to have presented his complaint of unfair dismissal before the end of the relevant time limit.

Conclusion

30. The claimant's claim received on 22 October 2017 comprising of automatic unfair dismissal for making a protected disclosure under Section 103A of the Employment Rights Act 1996 and unfair dismissal under Section 98 for failure to allow the claimant to be accompanied at a disciplinary hearing were not presented to the Employment Tribunal before the end of three months beginning with the effective date of termination on 24 May 2017.The Tribunal is satisfied that it was reasonably practicable for the complaints to be presented before the end of that period of three months and the complaint was not presented within such further period as the Tribunal considers reasonable. The Tribunal does not have the jurisdiction to consider the complaints, which are dismissed.

_____

17.4.18
Employment Judge Shotter

JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 April 2018

FOR THE TRIBUNAL OFFICE