EMPLOYMENT TRIBUNALS

BETWEEN

Claimant		**Respondent**
Mrs S Linford	AND	Barchester Healthcare Limited

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT Bodmin **ON** 20 September 2018

EMPLOYMENT JUDGE N J Roper

Representation

For the Claimant: In person, assisted by her husband Mr C Linford
For the Respondent: Mr Maxwell, Solicitor

JUDGMENT

The judgment of the tribunal is that the claimant's claims for unfair dismissal and for breach of contract were presented out of time and are hereby dismissed.

REASONS

1. This is the judgment following a Preliminary Hearing to determine whether or not the claimant's unfair dismissal and breach of contract claims were presented in time.
2. I have heard from the claimant, and from her husband on her behalf. I have heard from Mr Maxwell on behalf of the respondent. I find the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.
3. The respondent provides healthcare services and the claimant worked for the respondent as a healthcare assistant in Truro from 5 January 2012 until her dismissal by reason of gross misconduct with effect from 7 January 2016. The allegations of gross misconduct were that the claimant had acted in a disrespectful and humiliating way to residents.
4. The claimant was suspended before her dismissal and took advice from ACAS about her rights prior to her dismissal. She appealed against that dismissal and it took some time to

arrange an appeal hearing which took place on 13 April 2016. The appeal was dismissed and the respondent notified the claimant of that decision on 26 April 2016.

5. The claimant and her husband confirmed today that they were aware of her right to bring an unfair dismissal claim to this Tribunal, but did not do so because they were awaiting the result of the appeal before doing so.
6. Following the rejection of her appeal the claimant took further advice from ACAS and also made contact with the CAB on 29 April 2016, which resulted in a meeting at the CAB on 16 May 2016. They discussed a potential claim to this Tribunal and were advised that a fee was payable. The claimant recalled that the fee was in the region of £500 and was unable to afford this. In fact the issue fee was £250, with a prospective hearing fee of £950 potentially payable subsequently.
7. The claimant was impecunious. She had worked as a care worker on the national minimum wage working approximately 40 hours per week and did not own her home and had no savings. Following her dismissal she applied to claim benefits, and could only secure a part-time job as a cleaner working 10 hours per week. She and husband had no spare cash and simply could not afford the issue fee.
8. Following the decision in Unison, the fee regime was abolished on 26 July 2017. The claimant says that she only became aware that she might have the opportunity to bring a claim as a result of the Unison decision in April 2018. She made contact with ACAS under the Early Conciliation provisions on 24 April 2018, and was issued with an Early Conciliation Certificate on the same day 24 April 2018. She issued these proceedings on 7 May 2018.
9. Having established the above facts, I now apply the law.
10. The relevant statute is the Employment Rights Act 1996 (“the Act”). Section 111(2) of the Act provides that an employment tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or 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.
11. These provisions are effectively replicated for breach of contract claims under Article 7(a) and (c) of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.
12. Subsection 18A(1) of the Employment Tribunals Act 1996 (“the ETA”) provides that: “Before a person ("the prospective claimant)" presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.” Subsection 18A(4) ETA provides: “If - (a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or (b) the prescribed period expires without a settlement having been reached, the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant." Subsection 18A(8) ETA provides: “A person who is subject to the requirements in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).
13. Section 207B of the Act provides: (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision”). But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A. (2) In this section - (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section. (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted. (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period. (5)

Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

14. I have considered the following cases, namely: R (on the application of Unison) v Lord Chancellor [2017] UKSC 51; Palmer and Saunders v Southend-on-Sea BC [1984] ICR 372; Porter v Bandridge Ltd [1978] IRLR 271 CA; Wall's Meat Co v Khan [1978] IRLR 499; London Underground Ltd v Noel [1999] IRLR 621; Dedman v British Building and Engineering Appliances [1974] 1 All ER 520; and Wolverhampton University v Elbeltagi [2007] All E R (D) 303 EAT.
15. In this case the claimant's effective date of termination of employment was 7 January 2016. The three month time limit therefore expired at midnight on 6 April 2016. These proceedings were issued more than two years later on 7 May 2018. The ACAS Early Conciliation Certificate dates were Day A - 24 April 2018 and Day B - 24 April 2018. The claimant is not assisted by any extension of time by the ACAS Early Conciliation provisions because the time limit had already expired over two years before she approached ACAS.
16. The grounds relied upon by the claimant for suggesting that it was not reasonably practicable to have issued proceedings within the relevant time limit are that she was simply unable to afford the Tribunal fees, which was subsequently rendered unlawful.
17. The question of whether or not it was reasonably practicable for the claimant to have presented his or her claim in time is to be considered having regard to the following authorities. In Wall's Meat Co v Khan Lord Denning, (quoting himself in Dedman v British Building and Engineering Appliances) stated "it is simply to ask this question: has the man just cause or excuse for not presenting his complaint within the prescribed time?" The burden of proof is on the claimant, see Porter v Bandridge Ltd. In addition, the Tribunal must have regard to the entire period of the time limit (Elbeltagi).
18. In Palmer and Saunders v Southend-on-Sea BC the headnote suggests: "As the authorities also make clear, the answer to that question is pre-eminently an issue of fact for the Industrial Tribunal taking all the circumstances of the given case into account, and it is seldom that an appeal from its decision will lie. Dependent upon the circumstances of the particular case, in determining whether or not it was reasonably practicable to present the complaint in time, an Industrial Tribunal may wish to consider the substantial cause of the employee's failure to comply with the statutory time limit; whether he had been physically prevented from complying with the limitation period, for instance by illness or a postal strike, or something similar. It may be relevant for the Tribunal to investigate whether, at the time of dismissal, and if not when thereafter, the employee knew that he had the right to complain of unfair dismissal; in some cases the Tribunal may have to consider whether there was any misrepresentation about any relevant matter by the employer to the employee. It will frequently be necessary for the Tribunal to know whether the employee was being advised at any material time and, if so, by whom; the extent of the advisor's knowledge of the facts of the employee's case; and of the nature of any advice which they may have given him. It will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there was any substantial failure on the part of the employee or his adviser which led to the failure to comply with the time limit. The Industrial Tribunal may also wish to consider the manner in which and the reason for which the employee was dismissed, including the extent to which, if at all, the employer's conciliatory appeals machinery had been used. Contrary to the argument advanced on behalf of the appellants in the present case and the obiter dictum of Kilner Brown J in Crown Agents for Overseas Governments and Administrations v Lawal [1978] IRLR542, however, the mere fact that an employee was pursuing an appeal through the internal machinery does not mean that it was not reasonably practicable for the unfair dismissal application to be made in time. The views expressed by the EAT in Bodha v Hampshire Area Health Authority on this point were preferred to those expressed in Lawal:-
19. To this end the Tribunal should consider: (1) the substantial cause of the claimant's failure to comply with the time limit; (2) whether there was any physical impediment preventing compliance, such as illness, or a postal strike; (3) whether, and if so when, the claimant knew of his rights; (4) whether the employer had misrepresented any relevant matter to the

employee; and (5) whether the claimant had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the claimant or his adviser which led to the failure to present the complaint in time.

20. In addition, in Palmer and Saunders v Southend-on-Sea BC, and following its general review of the authorities, the Court of Appeal (per May LJ) 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".
21. Subsequently in London Underground Ltd v Noel, Judge LJ stated at paragraph 24 "The power to disapply the statutory period is therefore very restricted. In particular it is not available to be exercised, for example, "in all the circumstances", nor when it is "just and reasonable", nor even where the Tribunal "considers that there is a good reason" for doing so. As Browne Wilkinson J (as he then was) observed: "The statutory test remains one of practicability … the statutory test is not satisfied just because it was reasonable not to do what could be done" (Bodha v Hampshire Area Health Authority [1982] ICR 200 at p 204)
22. In the first place the claimant says that she did not consider issuing tribunal proceedings until after her appeal had been decided, but applying Palmer the fact that the claimant was pursuing an internal appeal does not mean that it was not reasonably practicable for her to have issued proceedings. In other words the time limit had already expired at the time that she first considered issuing proceedings.
23. In this case I do accept the claimant was impecunious following her dismissal and simply could not afford the fee. However, there was a system in place for remission of fees for impecunious claimants or those on benefits, and therefore there was no impediment caused by the fees regime which stood in the way of the claimant issuing proceedings within time. Furthermore, the claimant had access to advice from both ACAS and the CAB, and should have been aware of fees remission, and/or could easily have found that out.
24. The burden of proof is on the claimant to establish that it was not reasonably practicable for her to have issued proceedings within the three month time limit. In my judgment the claimant has not discharged that burden. I find that it was reasonably practicable for her to have issued these proceedings within time, and she did not do so. The claim was therefore presented out of time.
25. In any event I would also have found the claim to be out of time for this reason, namely that even if it were not reasonably practicable to have issued proceedings within the original time limit, these proceedings were not issued within such further period as is reasonable. The fees regime was abolished on 26 July 2017, and there was considerable national publicity about that event at the time. The claimant failed to make contact with ACAS under the Early Conciliation provisions for nearly a year, and Day A and Day B on the certificate were 24 April 2018. She then issued this claim some two weeks later on 7 May 2018. The claimant provided no satisfactory explanation as to why she waited nearly a year after the abolition of the fees regime before issuing these proceedings.
26. Accordingly, the claimant's claims for unfair dismissal and for breach of contract are hereby dismissed.

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Employment Judge N J Roper
Dated 20 September 2018