EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: S/4104512/2017

Held in Glasgow on 8 December 2017

Employment Judge: P Wallington QC

Mr James Gaffney	**Claimant** **Represented by:** **Mr J Jardine – Representative**
TSB Bank PLC	**Respondent** **Represented by:** **Ms I Ferber – Counsel**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The claimant's claim is time barred and the Tribunal has no jurisdiction to hear the claim. The claim is accordingly dismissed.

REASONS

1 In this case the claimant, Mr James Gaffney, claims against his former employers TSB Bank PLC, the respondent, for unfair dismissal. He was dismissed on 22 March 2017, and presented a claim of unfair dismissal on 3 September 2017. The respondent in its response took the point that the claim appeared to be time barred, and a direction was made for a Preliminary Hearing to determine the issue of time bar. That issue alone was referred for this Preliminary Hearing.

2 At the Hearing, the claimant gave evidence under affirmation. Ms Ferber did not call evidence, but relied on the evidence adduced by the claimant, and on

a small number of documents taken from a 185 page bundle of documents prepared for the hearing by their instructing solicitors. I note that Ms Ferber readily accepted that the great majority of the documents, which related to matters occurring before the dismissal of the claimant, were totally irrelevant to the issue before me in this Preliminary Hearing.

3 The claimant was not a particularly satisfactory witness, in so far as whilst I have no doubt that he was doing his best to assist the Tribunal and give truthful answers, his recollection was extremely poor, even for relatively recent events. I have borne this in mind in reaching my findings in fact.

Findings in Fact

4 The claimant was dismissed on grounds of misconduct on 22 March 2017, having by then accrued over 3 ½ years' service with the respondent. He was at that time receiving psychological counselling for mental health issues, but was not sufficiently unwell, then or subsequently during the period relevant to these proceedings, to be able to mount an appeal against his dismissal, obtain fresh employment, and deal with his trade union representative, to whom he effectively delegated the pursuit of whatever remedy was available to him. He had already had the benefit of union representation at the disciplinary hearing which resulted in his dismissal.

5 The claimant appealed against the decision to dismiss him, by an undated letter sent on or around 5 or 6 April 2017 (page 114). An appeal hearing was arranged and held on 27 April 2017 (notes are at pages 142 to 146). At that hearing Mr Peter Munday of the TSB Union represented the claimant. The appeal was unsuccessful. This was confirmed to the claimant in a letter dated 28 April 2017 (pages 147 to 148) which was sent to the claimant by post and received on or about 30 April 2017. The claimant then made contact with the TSB Union office in Edinburgh, and arranged to meet a full time official, Mr Simon Reynolds, in Edinburgh. This meeting took place shortly after the outcome of the appeal was made known. In the course of a quite lengthy meeting, the claimant explained the circumstances of his dismissal, and Mr Reynolds took detailed notes. He confirmed that he would pursue whatever remedies were available to the claimant, and the claimant left it in his hands

to do so. The claimant cannot recall whether or not any reference was made to the possibility of a claim to an Employment Tribunal in the course of this meeting, but I think it likely that this matter will have been mentioned. Prior to the meeting, the claimant was unaware of the possibility of making an unfair dismissal claim or of the existence of Employment Tribunals, and knew nothing about ACAS.

6 On 30 May 2017, Mr Reynolds e-mailed the claimant asking for information to enable him to submit a Subject Access Request under the Data Protection Act. The subject heading of the email was 'James Gaffney – Potential claim to the Employment Tribunal'. Following an exchange of e-mails over the next fortnight, during which the claimant duly provided additional pieces of information requested by Mr Reynolds, the latter provided him with a letter formally making a Subject Access Request, dated 13 June 2017, for the claimant to send together with the requisite fee of £10 to the respondent's Head Office. The claimant duly sent the letter and money.

7 In the meantime, the claimant had obtained a new job, working at a caravan park near Berwick-upon-Tweed, a considerable distance from his home in Stevenston. He was periodically in contact by telephone or e-mail with Mr Reynolds over the next two months. At some time, probably towards the end of July, the respondents supplied a large bundle of documents in response to the Subject Access Request, which the claimant forwarded to Mr Reynolds. He also had some contact with other officials of the union concerning the fact that his membership subscriptions had fallen behind. However, during this period the claimant understood that whatever claims were available to him were being progressed by the union.

8 Then on 14 August 2017, Mr Reynolds notified the claimant by e-mail that the union had decided that it could no longer act on his behalf as he had fallen behind with his subscriptions. The claimant disputed this, but was unsuccessful in changing Mr Reynolds' position. He asked Mr Reynolds to return the SAR papers, but in the event they were not received by the time the claim was presented on 7 September 2017. In the course of an exchange

of emails with the claimant on 14 August 2017, Mr Reynolds sent the claimant an email with the subject heading 'Re: James Gaffney – 187145 – ET claim'.

9 Before the union withdrew its support for the claimant, on 4 July 2017 an application was made to ACAS for early conciliation of the claimant's case. This was not made by the claimant, and indeed he knew nothing about it until after he had presented his claim. I was told by Mr Jardine that he had spoken with Mr Reynolds, who denied having made the reference to ACAS. However, it is plain that the reference must have been made by somebody in the union, and I find it rather improbable that it was done without the knowledge of Mr Reynolds, since he was in charge of the claimant's case. 4 July 2017 was some 14 days after the final date for the making of the reference to ACAS following the claimant's dismissal on 22 March 2017. ACAS provided an Early Conciliation Certificate for the matter dated 13 July 2017. The claimant was as unaware of this as he had been of the original notification.

10 When on 14 August 2017 the claimant became aware that his union was no longer acting on his behalf, he asked for the return of the papers and spoke to Mr Jardine, who worked with him at the caravan site where he had taken up employment. Mr Jardine immediately investigated the matter and discovered that there was an issue over the time limit for the presentation of a claim on behalf of the claimant. He also discovered the requirement for early conciliation, and notified ACAS on that date, 14 August 2017, for the purpose of early conciliation. Neither the claimant nor Mr Jardine appreciated that there was in existence already an Early Conciliation Certificate for the case. Nor, it would appear, did ACAS, since the request was dealt with in accordance with normal procedures, resulting in the issue of another certificate on either 30 or 31 August 2017 (the copy available to the Tribunal had not been sufficiently clearly photocopied for it to be possible to decide which of those dates was the correct one).

11 Having received the certificate, but at that stage not having received the SAR documents, Mr Jardine took the view that although the claim was by then out of time he should delay matters pending the arrival of the documentation, but only for a maximum of a week. He advised the claimant accordingly, and as

the documents had not arrived by 7 September 2017, he and the claimant sat down together and completed the ET1 online and submitted it on that date. Mr Jardine explained that the absence of the SAR documentation was the reason that the claim is sparsely pleaded.

Relevant Law

12 Section 111 of the Employment Rights Act 1996 provides that a claim for unfair dismissal must be presented before the end of the period of three months beginning with the effective date of termination, or, if it is not reasonably practicable to present the claim within that time limit, within such further period as the Tribunal considers reasonable. Section 111A provides for an extension of the time period to allow for ACAS Early Conciliation, but only if an application to ACAS is made within the primary limitation period prescribed by section 111.

13 There are thus potentially two issues for determination in this case; first, whether it was reasonably practicable for the claimant to present a claim, or at least refer his case to ACAS, by 21 June 2017, the onus being on the claimant to satisfy me that it was not reasonably practicable to do so; and secondly, if he does so satisfy me, whether the claim was presented within a reasonable time after 21 June 2017. In view of my finding on the first issue, it is not necessary for me to consider the second any further.

14 The question what matters make it not reasonably practicable to present a claim in time is the subject of a very substantial body of case law. Examples are incapacitating illness, and ignorance of the existence of the right to make a claim, but in the latter case only if the claimant was reasonably ignorant, a point which it has become increasingly difficult to assert convincingly over the 45 years since the right not to be unfairly dismissed was first introduced into the law.

15 Only one strand from this case law is directly relevant to the present case. This is the strand which begins with the seminal case of **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53**, in which the Court of Appeal held that if a dismissed employee instructs solicitors or other

skilled advisers to act for him in pursuing his claim, the prospective claimant is fixed with any delay or other negligence on the part of the advisers. This authority has been followed or approved in a string of subsequent cases. Ms Ferber referred me to **Friend v Institution of Professional managers [1999] IRLR 137** as authority for the proposition that a trade union is to be regarded in this context as a skilled adviser. That case was a High Court action for negligence against the union, which failed because the union had instructed solicitors, and it was to the solicitors to whom the claimant required to look for a remedy; but it is an authority for the proposition, albeit possibly obiter. A clearer authority for the point is **Cullinane v Balfour Beatty Engineering Services Ltd UKEAT/0537/10.** The point is in any case not in doubt.

Conclusions

16 In this case it is clear that the claimant handed over responsibility for pursuing whatever remedy he might have for his dismissal to his union. He did so well before the expiry of the statutory time limit for bringing a claim. Although at that stage he was unaware that the remedies that he could pursue included the raising of an unfair dismissal claim, it is clear that this was something that the TSB Union was at least undertaking to consider, as evidenced by the reference in Reynolds' email of 30 May 2017 to a 'potential unfair dismissal claim'.

17 It is also clear from the application made on the claimant's behalf for Early Conciliation, which can only have been made by someone working for the Union, that the mandate assumed by the Union included taking the steps necessary for a claim to be made. However, on the evidence available to me, no steps were taken to initiate the process of making a claim before the time limit for an application for early conciliation arrived on 21 June; all that had been done, to the claimant's knowledge, was that a SAR had been prepared for him to submit, and submitted, but far too late to expect the respondent to respond before time for a Tribunal claim had expired. One matter which would almost certainly need to have been broached with the claimant before any claim could be raised was the question of the fee that would, subject to possible remission, require to be paid (fees were not abolished until the

decision of the Supreme Court that they were unlawful, which was delivered at the end of July, over a month after the deadline for initiating the process by applying for Early Conciliation).

18 I have not heard the union's side of this story, and therefore cannot make any findings for the purpose of any proceedings there may be in the future between the claimant and the TSB Union. However, on the evidence before me, it is clear that the claimant had entrusted the making of whatever claims were open to him, which in fact included a claim for unfair dismissal, whether or not he appreciated this as a possibility after his meeting with Mr Reynolds, to the Union, which on the authorities is a 'skilled adviser'.

19 It is also apparent, from the subject heading of the e-mail sent by Mr Reynolds requesting information for the SAR, both that the possibility of such a claim was in the mind of Mr Reynolds by the end of May 2017, and that after receipt of that e-mail the claimant must have been aware of the possibility of a claim to an Employment Tribunal, although he took no steps to find out what that might entail or what an Employment Tribunal was, or indeed what remedy he might seek. The obvious reason why he did not do so is that he had left matters in the Union's hands.

20 Unfortunately, the Union did not act timeously. There is no evidence of any step having been taken to advance an unfair dismissal claim until the application to ACAS was made, almost two weeks after the claim had become potentially time barred. In the absence of any evidence from the Union, I should not speculate as to why not, but the obvious inference is either negligence or incompetence. Either way, the claimant cannot demonstrate on the evidence before me that the Union was not at fault, the test proposed by Lord Denning in **Dedman**. This case is therefore on all fours with the skilled adviser authorities; the claimant has failed to show that it was not reasonably practicable for the Union, acting as his agent, to start the process of claiming within the statutory time limit; and the tribunal therefore has no jurisdiction over his claim by reason of time bar.

21 The fact that the Union in August 2017 withdrew its support for the claimant because he had failed to pay his subscription on time is in my view wholly

irrelevant to the issue of time bar, since it was only in August 2017 that the Union indicated that non-payment of subscription was a problem affecting its willingness to act for him. The Union was still acting for him in progressing his unfair dismissal claim when it applied for early conciliation on 4 July; but it did so too late to preserve his claim.

22 It is not in these circumstances necessary for me to consider whether the claim was presented within a reasonable period after 21 June 2017; I merely indicate that it would be an uphill task for the claimant to persuade me that a period of 2 ½ months was a reasonable period.

23 The outcome is clearly very unfortunate for the claimant, for whom I have every sympathy that he has lost the opportunity through no fault of his own (the subscription issue having arisen only after the failure to act timeously on his behalf had effectively deprived him of the opportunity to raise a claim).

24 It is not for me to say whether there is the basis for a claim against the Union, as I have heard only one of the potential parties' cases, but it is a matter on which it would be prudent for the claimant to seek professional legal advice at an early stage. So far as this Tribunal is concerned, there is no alternative but to dismiss the claim on grounds of time bar. It is accordingly dismissed.

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Employment Judge: P Wallington QC
Date of Judgment: 14 December 2017
Entered in Register: 21 December 2017
and Copied to Parties