EMPLOYMENT TRIBUNALS

Claimant: **S Bradley**

Respondent: **Industrial Technology Systems Limited**

Heard at: **Newcastle Upon Tyne On:** **31 July 2018**

Before: Employment Judge O'Dempsey

Representation
Claimant: self
Respondent: D Morgan (Counsel)

JUDGMENT having been sent to the parties on 18 October 2018 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. By a claim form dated as received on 4 April 2018 the claimant claims that she was employed by the respondent from 15 June 2015 until 22 September 2017 as an office manager. She claims that she was unfairly dismissed, having been constructively dismissed on that date. The early conciliation period started on 21 December 2017 and the certificate was issued on 4 February 2018.

2. The respondent in its response form which was received on 4 May 2018 states as follows (as relevant for this hearing): –
   "the respondent contends that the tribunal does not have jurisdiction to hear the claimant's claim for constructive unfair dismissal as the claimant's claim is time-barred, as the claimant's claim was lodged on 4 April 2018, outside the time limit and taking into account the extension to limitation period due to early ACAS conciliation."

3. In essence the respondent otherwise denied constructive dismissal had occurred.

4. On 16 June 2018 employment Judge Buchanan listed a preliminary hearing. This is the current hearing. This was to determine whether it was recently practical for the claimant to present a claim of unfair dismissal before the end of the period of three months beginning with the effective date of termination of her employment and if not, whether the claim has been presented within such further period as is reasonable pursuant to section 1 1 1 (2) Employment Rights Act 1996 ("the 1996 Act") as amended by section 207B of the 1996 Act".

5. The parties appeared to agree that the effective date of termination was 22nd of September 2017. On 30 August 2017 the claimant had resigned her employment by a letter which appears at page 48 of the bundle. The resignation was by notice and the date of expiry of the notice was 22 September 2017.

6. Claimant started ACAS early conciliation on 21 December 2017. The ACAS certificate was issued on 4 February 2018. The respondent argues that because the claim was submitted on 4 April 2018 rather than any earlier date it was presented outside the time limit even with the extension for ACAS early conciliation.

7. The claimant's position was that she had submitted her claim in February 2018. Clearly this would have been within the requisite extended time limit provided it was submitted after 4 February 2018.

8. At the hearing, and without objection from the claimant, the respondent submitted an email showing the difference (it submitted) between a claim number for an employer tribunal compared with the case number which the tribunal allocates to that case once it has been successfully started.

9. The document shows a claim number, which is not relevant for this case save in the way it is set out. It is set out as a series of numbers (three numbers) followed by a letter; followed by a dash, followed by three numerals followed by a capital letter.

10. The claimant gave evidence as to the date on which she first as she thought submitted her claim to the employment tribunal. She says that the first time she filled the form in she had been to her mother's and she was around at her brother's at about between five and 7 o'clock in the evening. She was discussing some particularly difficult family matters relating to the health of one of her parents with her brother. She could not remember whether she had attempted to complete the form on her phone or whether it was on her brother's laptop.

11. She told me about what she could remember of that process. She said, for example, that the process asks the applicant to identify whether there were other people who had claims against the same employer. She said that there were some questions that she could not answer. For example the form asked for brief details of the claim that she was applying for. She told me that she roughed this out on a jotted notepaper.

12. She told me that she could not remember how the process finished. However she did remember that it involved certain boxes that you filled in. She said that there was an email sent to her, which she had not produced

for the tribunal, and she was not sure whether she could produce it now. She thought she might be able to. However that email gave the same reference number as the electronic process. This was the reference number to which she referred later on. She did not apply for an adjournment to obtain the email.

13. When giving her evidence the claimant, for understandable reasons, was slightly vague on the events around this time. She told me that her understanding was that there was no specific timeframe imposed by the email sent to her but that she thought that words to the effect of "don't leave it too long" were used by ACAS. However she also told me that even in April she did not know that what there was a time limit.

14. In essence she said that the email gave her a reference number but she could not remember what else it said. She told me that she did not send the email to the tribunal and she did not know why she had not done so.

15. She thought that she had submitted a claim however because she had a reference number and because she had applied. She thought she had done as the tribunal had requested her to do and she took it is that there had been some acknowledgement of receipt of her application. Although she said she did not know that there was any time limit she said that she knew she had three months to apply to the tribunal for the original claim. She said that she did not know that there was a limitation period once ACAS conciliation had taken place. From this I understand her to mean that she believed that she had commenced her proceedings once she had started ACAS conciliation.

16. When the claimant was cross-examined she accepted that the date of her resignation was 22 September 2017. She accepted that she had started the conciliation process in December. This was when she had contacted ACAS to say that she thought she might have a claim from fair dismissal.

17. She said that it was after the date on which she started ACAS conciliation that she began inputting information onto the claim form which was online.

18. It was unclear to me whether she had started to fill in the online form in December or February. However for the purposes of my decision it does not matter which of these dates it was.

19. There was some contact between the claimant and ACAS at the end of January according to the claimant. Finally the claimant said that she thought she probably had started the online process at the end of February.

20. I think it is most likely that she started the online process in February.

21. The claimant was cross-examined on the reference number that she received and was referred to page 52 of the bundle. This is her email to the employment tribunal which gives the reference number BT 34 – F3 KK.

22. The employment tribunal administration told the claimant that it had not received this claim form and it appears that the claim form was not submitted in February. The claimant appeared to accept that the claim form which she thought was presented in February was not actually received by the employment tribunal. I find that this is the most likely explanation of the lack of response from the tribunal to what the claimant had in fact done.

23. The claimant said that as far as she was concerned she had completed all the boxes in the claim form. When it was put to her that she had the ability to complete the claim form she made the obvious point that she thought she had completed the claim form. She therefore asked, understandably, why she should complete something she had already done.

24. It was put to her that the reference number she had given was from an incomplete form. Of course the claimant was unable to say whether there are two different numbers, not having experience of the tribunal system before.

25. The claimant thought that she had not saved the form because she thought she had completed it all together in one session. It is clear to me that the claimant had a great many personal issues in her life at the time that she was seeking to complete this form.

26. When it was put her that there was no evidence that she had chased progress of her claim from the end of February to 3 April, the claimant very frankly said that she did not chase because she had a lot going on. She also said that she did not consider the literature that exists from ACAS for the same reason.

27. She did agree however that she had put down (in December) the substance of her claim (page 18 – 28). It seems to me that the precise date when she wrote down the substance of her claim does not matter. What matters is whether it was reasonably practicable for her to present the claim within the time limit.

28. I note, as I have said above, that the claimant had a great many personal issues in her life at this time. These relate to her elderly parents in the main. She herself was ill at one point with a viral illness.

29. The respondent sought to call certain witnesses. Mr Graham John Ives was called. The basis of his knowledge of the matters that he sets out in paragraph 9 of his written witness statement, as he readily admitted, was material he had been told by his legal advisers of which he had no personal knowledge. He was happy to accept that the claimant thought that she had submitted a claim.

30. I raised the issue of the status of the material that had been offered by Mr Ives, with counsel. It seemed to me that the respondent was seeking to rely on material which appeared to constitute legal advice. I was not prepared to give that material, in that form, any real weight. The

respondent should not have presented that material to the tribunal if it was not intending to waive legal privilege. As it became completely clear to me that the respondent had no intention of seeking to waive privilege, the most proportionate means of dealing with this evidence was to give it no weight. Accordingly I gave Mr Ives account in paragraph 9 of his witness statement no weight.

31. Confronted with this approach the respondent asked for a brief adjournment to take instructions. Mr Morgan then said that he wished to call Nazia Aftab, his solicitor, acting for the respondent. He explained that this witness would be able to speak to the provenance of the document which the respondent wished to introduce into evidence an example of a reference number.

32. I asked the claimant whether she had any objection to this witness being called to show how the document came to be created and to speak to the provenance of that document and the claimant had no objection.

33. In the light of that I allowed the respondent to call this witness, unusually. It seemed to me to be in the interests of justice and in the interest of furthering the overriding objective. In particular the overriding objective requires me to consider the proportionality of taking any other course, such as adjourning the case. However the evidence which the witness was to give amounted in reality to no more than the production of a document (an email) to illustrate the process of the employment tribunal's online submission procedure.

34. Nazia Aftab is a solicitor. She explained that the document was an email which her trainee had forwarded to her on 25 July 2018 at 09.31 in the morning. The document came to be created as research to show the process involved when a person starts a claim form, submits a claim form, and it was intended to show the stage where the claim has not been submitted to the tribunal.

35. She explained that she had 17 years experience as an employment lawyer and that the electronic portal, of which the email gave an example, had been introduced in the last few years. She explained that all the tribunal claims that her firm submits go through the portal rather than through the post. She explained that the email showed a point when the claimant had been started but not submitted.

36. She said that her firm has had past experience of submitting employment tribunal claims and what they do is to save the claim and print it before submitting it. She drew my attention to the words on the bottom of the email "you will receive a confirmation email once you have submitted your claim". This is something which is clear simply by looking at the document, which appears to be a screen shot.

37. The claimant was able to (and did) cross examine this witness. Ms Aftab accepted that the document itself was a dummy run. She explained that this is what happened every time she was about to submit a claim on the computer and she explained that in the few months since the abolition of employment tribunal fees she had been involved in this process four or five times. She explained that she works with a team and she assists that

team. When challenged that she did not have a very great level of experience about this she explained that her experience was greater than the ordinary person in the street.

38. Mr Morgan sought to re-examine on the basis of Mr Ives statement at paragraph 9, and the claimant objected to this. It seemed to me that Mr Morgan was seeking to introduce questions which ought to have been the subject of the application before his witness gave a evidence in chief, and therefore I refused permission for him to ask questions based on that statement. Mr Morgan then sought opinion evidence from this witness as to whether the claimant had submitted a claim in time or simply made a draft of her claim. It seemed to me that this material did arise out of the cross examination however it was opinion evidence and I am not prepared to place very much weight on it at all. It also appeared to me to be unnecessary. I gave the claimant a further opportunity to cross-examine on this re-examination because it seems to me that it had ranged rather further then the cross examination. The witness explained that she could tell the difference between a case number for an employment tribunal and a reference number for a claim which has been started but not yet submitted because of her experience.

Parties' submissions

39. Mr Morgan made submissions that the claimant had agreed that she did not present a claim to the tribunal within the time limit. Therefore the claim was presented outside of time limit. He submitted to me that I must consider whether it was reasonably practicable for the claim to be presented within the primary time limit. He suggested that I should not take account of early conciliation. He submitted to me that given what she knew it must have been reasonably feasible for the claimant to her presented a claim within the time limit.

40. He finished by pointing out that the email which had been produced to the tribunal and the claimant that morning contained the statement that the claimant would receive a confirmation email. He asked me to accept that all that had happened within the time limit was that the claimant had started her claim but that she failed to present it.

41. The claimant asked me to extend the time limit in her favour and submitted that she had been confused.

The law

42. Section 111 of the employment rights act 1996 provides, so far as relevant,

> "(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."

43. The factors I can take into account in relation to this statutory test will vary from case to case. I can take account of

a. the manner of, and reason for, dismissal (here resignation by letter giving notice);
b. what the substantial cause of the claimant's failure to comply with the time limits maybe (here the belief that she had successfully completed the online presentation process);
c. whether there was a physical impediment such as an illness (I took account that at some point she suffered from a viral illness);
d. whether and when the claimant knew of her rights (I have found that she did know that she must present her claim without undue delay after the ACAS conciliation period was completed, and knew that she had to present the claim within 3 months of the effective date of termination (subject to the ACAS conciliation extension);
e. whether the employer misrepresented any relevant matter (it did not);
f. whether the claimant had been advised by anyone and the nature of the advice given (the claimant says that ACAS told her not to leave it very long after the conciliation period finished);
g. whether there was any substantial fault on the part of the claimant or the adviser which led to the failure to present a claim in time (it appears that the claimant did not read the screen during the online submission process which gave her the reference number).

44. The Court of Appeal in *Marks & Spencer plc v Williams – Ryan* (2005) EWCA Civ 470 set out a number of legal principles: –

a. Section 111 (2) should be given a liberal interpretation in favour of claimants;
b. regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and the time limit for doing so;
c. regard should also be had to what knowledge the employee should have had, had they acted reasonably in the circumstances;
d. Knowledge of the right to make a claim does not, as matter of law, mean that ignorance of the time limits will never be reasonable. It merely makes it more difficult for the employee to prove that their ignorance was reasonable.

45. It seems to me that there is some guidance to be gained from the case of *Solus (London) Ltd v Matthews* UKAEAT/0395/10. Mr Matthews made an error by submitting his claim form online to the Northern Ireland industrial tribunal as opposed to the Bedford employment tribunal. Once he was informed of his error he sought advice and presented his claim correctly 10 days later (and outside the time limit). In that case unemployment judge permitted claim to proceed. The respondent appealed.

46. The Employment Appeal Tribunal held that while the mistake in presenting the claim to the wrong tribunal was not necessarily fatal to the claim, it was necessary for the claimant first to show that mistake to have been a reasonable one to make. In that case the employment tribunal

had failed to make a finding, fully, about the nature of the claimant's mistake and whether it had been reasonable. The case was remitted for consideration by a fresh tribunal because there were arguments on both sides.

Discussion

47. Having set out the law and having in mind the extensive citations of well-known case law in Mr Morgan's skeleton argument, it seems to me that this is not a case in which the error of the claimant was a reasonable one for her to make. I accept that the email which it is likely that she received from the employment tribunal would have contained the words cited by Ms Aftab that the claimant would receive a confirmation email once she had submitted the claim so as to present the claim. It seems to me that the inescapable consequence of that piece of evidence, which the respondent ought to have provided to the claimant well in advance of the hearing before me, was that the claimant's belief that she had presented her claim was an unreasonable belief. It simply was contradicted by the evidence.

48. I have a great deal of sympathy for the claimant in relation to whether she presented her claim. I have a great deal of sympathy for the fact that she may not have noticed that she had not completed the process online the first time she tried it. However I have to consider the correct legal tests to be applied. The chief question for me is whether it was reasonably practicable for the claim to have been present within the time limit.

49. It seems to me that without any knowledge of how the employment tribunal operates, once the claimant had received message from the tribunal at the point she reached in the submission process, she should have realised that she had not completed the form.

50. Moreover when she did not receive any confirmation from the tribunal, her belief that she had submitted her claim so as to present it was not a reasonable error for her to make. She did not receive any confirmation email within a couple of weeks let alone a couple of days. I conclude that anyone would have realised that their belief was mistaken in these circumstances.

51. I have to ask myself the question of whether it was reasonably practicable for her to present her claim within the time limit. Doing so I need to have regard to the statement of principle in *Walls Meat Company Limited v Khan* (1979) ICR 52.

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interference with, or inhibits, such performance. The impediment may be physical, for instance the illness of the complainant or a postal strike; all 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 complaint within (time), if the ignorance on the one hand, or the mistaken belief on the other, is itself

reasonable. I the state of mind will, further, not be reasonable if it arises from the full to the complainant in not making such enquiries as he should reasonably and all the circumstances have made…"

52. It seems to me that it was reasonably practicable for the claimant to present her claim within the limitation period. Although she was under a great deal of personal pressure during this time, she took some steps towards starting her claim. She had sufficient information available to her for her to reach the conclusion that she had not in fact submitted the form so as to present it. There were further steps that needed to be taken.

53. I find that it is more likely than not that she received the information contained in the screen that gave her the reference number including the statement that once she had submitted the claim, which she was capable of doing by clicking on the relevant buttons, she would receive an email confirming that the claim had been presented.

54. It is clear that no claim number was ever attached to the reference number which the claimant had.

55. It is clear also that she never made any enquiries between the time in February when she says that she had received the reference number with that statement on it and the time when she eventually did make enquiries of what had happened at the start of April. I do not consider that this was a reasonable mistake to make even taking account of the difficult personal circumstances which the claimant has set out in her statement and referred to in her oral evidence before me.

56. So I consider that although the claimant genuinely believed that she had presented the claimant to the tribunal sometime in February, on the basis of the evidence of the type of information that I consider it was likely she received containing the reference number, her belief was not reasonable.

57. Those circumstances her claim of unfair dismissal is dismissed as the tribunal has no jurisdiction.

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Employment Judge O'Dempsey

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Date 8 November 2018