RM

EMPLOYMENT TRIBUNALS

Claimant: **Ms SM Zhou**

Respondent: **North East London NHS Foundation Trust**

Heard at: **East London Hearing Centre**

On: **13 December 2018**

Before: **Employment Judge Foxwell**

Representation

Claimant: Mr A Bousfield, Counsel

Respondent: Mr N Caiden, Counsel

JUDGMENT

Paragraph 3 of the judgment sent to the parties on 10 July 2017 having been set aside by the Employment Appeal Tribunal, the judgment of the Tribunal is that:-

1. It was reasonably practicable to present these claims within the primary time limit. The Claimant did not do so and, accordingly, the Tribunal has no jurisdiction to decide them and they are dismissed.

REASONS

Introduction

1 This is the remitted hearing of this matter. It arises from the judgment of Her Honour Eady QC in the Employment Appeal Tribunal handed down on 5 July 2018, following the Respondent's successful appeal against my judgment sent to the parties on 10 July 2017. Despite Judge Eady's complimentary comments on many aspects of my decision, she accepted the Respondent's submission that I had failed either to consider, or if I had, to explain my reasoning on the question whether the Claimant's solicitors acted reasonably in failing to check the claim form before submitting it to the Employment Tribunal on behalf of the Claimant. She could not be sure, therefore, that I had applied the *Dedman* principle correctly.

2 By way of reminder, the *Dedman* principle is based on two fundamental propositions: firstly, that a Claimant is bound by the acts of her solicitor; and, secondly, generally speaking, a Claimant acting through a solicitor or other professional adviser will be unable to rely on the "not reasonably practicable" exception in the Employment Rights Act 1996 where an adviser acting reasonably would have avoided a particular pitfall but, in fact, has failed to do so.

3 References in these Reasons to "the solicitors" are to the Claimant's solicitors, Hodge Jones and Allen. It is also worth recapping the undisputed facts which are as follows. On 30 September 2015, the solicitors presented a claim to the Tribunal on the Claimant's behalf. I found that this was the last day of the limitation period. The claim from was returned to the solicitors by the Tribunal for non-payment of fees and because the early conciliation number contained in the form was incomplete as the last two digits were missing. The form was resubmitted on 6 October 2015 and was accepted. On this occasion the early conciliation certificate number had been corrected but, unfortunately from the Claimant's perspective, by this time the primary limitation period had expired. It is also the case that the Claimant had completed the proforma part of her ET1 herself and it was she who had omitted the full early conciliation number by mistake. Her solicitors had not spotted this error. I have no doubt that, had they done so, they would have corrected it.

My task at the remitted hearing

4 The first issue I considered is my task at this remitted hearing. I held a preliminary hearing by telephone on 17 September 2018 at which the parties agreed that no further evidence was required. They have, however, produced a supplemental bundle of documents for this hearing which included Mr Bousfield's notes of evidence from the earlier hearing which I was happy to rely on (they did not differ from my own notes materially).

5 At the start of today's hearing Mr Bousfield asked for permission to adduce evidence of the sum received by his instructing solicitors from the Claimant on account of costs. After discussion, Mr Caiden was happy to agree as a fact that this was £500. Ms Radia was available to give evidence about this had it been necessary but she did not need to be called for that piece of information to be added to the stock of evidence in this case.

6 I then returned to the question of my task on this remitted hearing. The Claimant's primary argument was that all the Employment Appeal Tribunal required of me was to supply my reasons for my express or implicit finding that the Claimant's solicitors' failure to spot the error in the early conciliation certificate number on the ET1 prior to its initial presentation was "reasonable" in the circumstances. This submission was based on paragraph 49 of Judge Eady's judgment. Mr Bousfield contended that a reasonable error would not contravene the *Dedman* principle and that it would be consistent with my previous findings to confirm that the error was reasonable. Alternatively he argued that, if I must undertake further factual analysis, the facts showed that the error <u>was</u> reasonable in all the circumstances.

7 Mr Caiden argued that the EAT had held that the issues of the reasonableness of the solicitors' conduct and how it is to be considered under the *Dedman* principle were

simply not dealt with in my judgment and must be analysed and decided by reference to the evidence and that principle in this hearing.

8 I agreed with Mr Caiden's interpretation of the EAT's judgment, particularly having regards to paragraphs 46 to 48. That said, I did, in fact, give some thought to the reasonableness of the Claimant's solicitors' actions in respect of the early conciliation number in light of the decision in *Adams v BT* (see paragraphs 71 and 72 of my original judgment) but one benefit of today's submissions has been the opportunity to further analyse this aspect: I consider that I may have been too ready to draw a direct analogy between the facts of *Adams* and the facts of this case. I obviously accept without demur the EAT's finding that any thinking of mine on this point was insufficiently explained in any event.

9 For these reasons, therefore, I received submissions on the remitted issue of the reasonableness of the solicitors' acts or omissions on the basis that it was not dealt with expressly or impliedly in my previous judgment.

The Claimant's submissions

10 I received submissions from Mr Bousfield first as the burden of proof in establishing the Tribunal's jurisdiction remains on him.

11 Mr Bousfield acknowledged that he was bound by my finding that the solicitors were at fault in failing to spot the error in the early conciliation number but he relied also on my observation, approved by HH Judge Eady, that fault does not necessarily equal unreasonableness (see paragraph 71 of my previous judgment). He also relied on the case of *Marks & Spencer v Williams-Ryan* cited previously. In that case Lord Phillips suggested that a focus on who gave advice and in what circumstances is necessary when analysing the application of the *Dedman* principle. Mr Bousfield referred to the judgment of Underhill J (as he then was) in *Northampton County Council v Entwhistle* where he commented that it was conceivable that a failure by a professional adviser to give advice was reasonable. Mr Bousfield referred too to the case of *Basley* which was before me at the previous hearing. In that case a solicitor was found to have been at fault for not checking whether a document sent by fax to the Tribunal had been received. On appeal it was held that, while this was a fault, it was not an unreasonable one because it really would be a surfeit of caution to double check such a thing. So, plainly, there is scope for a Tribunal to consider the reasonableness of an error in light of all the circumstances when applying the *Dedman* principle.

12 Having established that context by reference to the caselaw, Mr Bousfield referred me to the following factual matters in this case: firstly, that the claim form was completed by the Claimant to save costs; this was Ms Radia's express evidence which I accepted. She also gave evidence that costs were an acute consideration and I had no difficulty in accepting that either. I was told today (as explained above) that the sum of £500 had been received by the solicitors on account; a substantial sum for an individual but very little indeed in the context of the costs of litigation. Mr Bousfield also contended that it was reasonable for the solicitors to expect that the Claimant had done what she said she was going to do, which was fill in the claim form. She had the materials to do so. He also pointed out that, if the solicitors had then checked the form, there would have been no saving or only a reduced saving in costs. He challenged the suggestion it was simply a

matter of checking a few numbers by saying that it was more involved than that. Many of these factors were identified by HHJ Eady as potentially relevant at paragraph 49 of her judgment.

13 There were other aspects to Mr Bousfield's submissions. I do not attach any weight to his submission that, if the error in the early conciliation certificate number had been pointed out by the Employment Tribunal's staff on the day the claim form was received, it would have been corrected immediately. While I am sure that this is probably right, it places a burden on Tribunal staff to correct claims when they are presented - that is not their role and it would be undesirable for Tribunal staff become involved in the procedural merits of parties' claims when the Tribunal is meant to be impartial.

14 Mr Bousfield also described the certificate number errors as "minor and technical". I agree with his description but, unfortunately, the requirement for a correct early conciliation certificate number is a jurisdictional one from which there is no escape. This was confirmed in the case of *Stirling v United Learning Trust*. At the last hearing I considered the later case of *Adams* but *Adams* is consistent with *Stirling* on this point.

15 Similarly, I do not find that I can draw any useful comparison with the cases of the *Secretary of State for Business v Parry* or *Mitchell v Newsgroup*. In *Parry* the claimant's solicitors had submitted a claim form with the wrong grounds of claim; an Employment Judge struck the claim out on the basis that it could not be responded to reasonably but this decision was overturned on appeal as being overly-technical. I note, however, that the *Parry* case concerned a matter of procedure rather than jurisdiction. *Mitchell v Newsgroup* is a case about relief from sanctions under the Civil Procedure Rules but this Tribunal is not bound by the those Rules and they have no direct application here where the issue I must deal with is jurisdictional and not merely procedural.

16 One aspect of Mr Bousfiled submissions to which I have given careful thought however is the scope of a solicitor's retainer. He referred me to the case of *Minkin v Lesley Landsburgh [2015] EWCA 1152* where the Court of Appeal considered the duties owed by solicitors where they have a limited retainer. Lord Justice Jackson said as follows in that respect at paragraph 76 of the Court's judgment

> *"There would be very serious consequences for both the Courts and litigants in person generally if solicitors were put in a position that they felt unable to accept instructions to act on a limited retainer basis for fear that what they anticipated to be a modest and relatively inexpensive drafting exercise of a document (albeit complex to a lay person) may lead to them having imposed upon them a far broader duty of care requiring them to consider, and take it upon themselves to advise on aspects of the case far beyond that to which they believed themselves to have been instructed."*

17 This judgment concerned the practice, common as I understand it in matrimonial finance cases, for litigants in person to instruct solicitors to deal with specific aspects of the ancillary relief procedure. The concept of limited or "unpacked" services is one of the circumstances which may apply in this case and therefore may be relevant to deciding whether fault was reasonable.

18 I turn then to the Respondent's submissions. Mr Caiden prefaced his remarks by

urging me to look at matters dispassionately and to set aside any sympathy I might have for the predicament the Claimant finds herself in. He asked me to bear in mind that this is more than a technical defect, employers are entitled, he says, to rely on jurisdictional defences and my judgment on this should not be clouded by sympathy for the Claimant or disapproval of such technical barriers or concerns because of the unfortunate procedural history of this case.

19 Mr Caiden then summarised the issue on this remitted hearing as this: "was the solicitors' fault in not spotting the early conciliation error on the ET1 reasonable or not?" He accepted that fault does not necessarily equal unreasonableness and that this will depend on the circumstances. His key submission, however, was that this is a factual enquiry to be decided on the evidence in the case. He said that it would be an error to simply draw an analogy with other cases (as I did with *Adams*) where the facts may be different. He reminded me of the burden of proof and the fact, therefore, that the Respondent would be entitled to succeed if the Claimant fails to discharge it.

20 As far as the circumstances are concerned Mr Caiden argued, firstly, that the solicitors were in possession of the ACAS early conciliation certificate as it was sent to them on 31 August 2015 (pages 74 to 76 of the original trial bundle). Secondly, Ms Radia was aware of the requirement to provide an early conciliation certificate number and of the decision in the case of *Stirling* referred to above. Thirdly, that solicitors were acting under a paid retainer so, while costs may have been an issue, this is not a case of *pro bono* advice as might apply to the Citizens Advice Bureau or an informal arrangement to advise. Fourthly, he said that Ms Raida had confirmed in evidence that part of the solicitors' service was to ensure that the claim form had been submitted correctly procedurally. Fifthly, he said that it would have taken very little time or effort to check the mandatory information in a claim form (the early conciliation certificate number is a part of this): had the solicitors done so the error would have been spotted and avoided.

Findings of fact and conclusion

21 Against the background of those submissions, I turned to my further findings of fact which I made based on Mr Bousfield's notes of the evidence presented on the last occasion (which were materially the same as my own). This approach was not objected to by the Respondent and, in fact, Mr Caiden relied on Mr Bousfield's note extensively in his submissions.

22 The note of Ms Radia's evidence starts at page 48 in the bundle prepared for this hearing. She confirmed that she had a good knowledge of the principles relating to early conciliation certificates and was aware of the case of *Stirling* (page 49). Later in that passage of evidence she was referred to page 74 of the trial bundle, the documentation relating to the early conciliation certificate, and she confirmed that she knew of the importance of quoting the full EC number. One other matter that she dealt with in that passage of evidence was the costs sensitivity in this case and I have no hesitation in accepting that avoiding costs was a very real consideration.

23 At page 50 Ms Radia gave evidence about the nature of a solicitor's service. Mr Caiden asked, *"Part of the firm's service to make sure form submitted is procedurally fine?"* to which she replied, *"my firm filed ET1 on behalf of client, yes"*. Mr Caiden then asked, *"do you accept service check form procedurally fine?"* to which she replied *"on this*

occasion, yes". The natural reading of this passage of evidence is that Ms Radia accepted that it was part of a solicitor's service to check that the claim form was procedurally fine. I accept Ms Radia's evidence.

24 I have considered whether Ms Radia had a retainer of the type described in *Minkin*. In *Minkin* the Court of Appeal was considering the duties of solicitors retained to deal with a step within proceedings whereas part of the retainer here concerned the initiation of proceedings, that is the successful invoking of the Tribunal's jurisdiction. The obligations and risks concerning this are heightened when time is running out.

25 Against that background, and setting my personal sympathies to one side, I cannot find that it was a reasonable fault to fail to check the EC number as it went to the heart of the Tribunal's jurisdiction and having regard to Ms Radia's description of the scope of her firm's retainer. In so far as I drew an analogy with the case of *Adams* on this point in my earlier judgment, I find that this was wrong as the facts concerning the solicitors' role in that case were insufficiently explained to be truly comparable.

26 In the case of *Entwhistle* Underhill J (as he then was) described the *Dedman* principle in the following terms

> *"The burden of the Dedman principle is that in a case where a Claimant has consulted skilled advisers the question of reasonable practicability is to be judged by what he could have done if he had been given such advice as they should reasonably in all the circumstances have given him, see the judgment of Brandon LJ in the Walls case quoted at paragraph 53 above".*

27 The advice or action that would have been given or done in this case was to correct the early conciliation and with that this problem would have gone away. I touched on the care needed for claims submitted at the end of the limitation period at paragraph 62 of my previous judgment. I cannot find, therefore, that the solicitors acted reasonably in this aspect of the provision of their service.

28 I have reminded myself that there were two causes for the return of the claim form on 1 October 2015. That relating to fees would not have been fatal to the late presentation of this claim for the reasons given in my first judgment. I have considered the issue of causation in respect of the error concerning the early conciliation certificate in this context as this defect was corrected when the claim form was resubmitted on 6 October 2015. I asked both counsel for submissions on this, notwithstanding that it was not an issue raised in either skeleton argument or, as I understand it, in the EAT. Put simply, the question was whether I should look at the errors together or separately. A collective approach might arguably support a conclusion that, as the claim form was and would always have been rejected for a breach of a Fees Order subsequently found to be unlawful, an extension of time would have been necessary in any event and the resubmitted claim did not contain a defective EC number. I concluded, however, that the correct approach was to look at both components separately; to do otherwise would be to place a claimant (or her advisor) who makes two errors in a better position that one who made only one error. The fact is that the first presentation of this claim form was doomed by the early conciliation error irrespective of the fees issue. So, the fact that there were two operative causes does not provide any escape here.

29 After all that the parties have been through and with the Claimant in mind in particular, it gives me no pleasure to conclude that this was a case where the *Dedman* principle applies such that it was reasonably practicable to present the claim in time. As this did not happen I must find that the Tribunal has no jurisdiction in this case. In light of those findings I have replaced paragraph 3 of my judgment sent to the parties on 10 July 2017 with a judgment in the following terms:

> *"It was reasonably practicable to present these claims within the primary time limit. The Claimant did not do so and accordingly the Tribunal has no jurisdiction to decide them and they are dismissed."*

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Employment Judge Foxwell
Dated: 7 January 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE