EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
O C	v	**J A G**

PRELIMINARY HEARING

Heard at: **Watford** **On: 28 January 2019**

Before: Employment Judge Bedeau

Appearances:

For the Claimant: **Mr S Brittenden, Counsel**
For the Respondents: **Mrs R Kirk, Solicitor**

RESERVED JUDGMENT

1. The tribunal does not have jurisdiction to hear and determine the claimant's unfair dismissal claim as it was presented out of time. Accordingly, it is struck out.

2. The case listed for hearing from 1 to 4 April 2019, is hereby vacated.

REASONS

1. By a claim form presented to the tribunal on 11 January 2018, the claimant made the single claim of unfair dismissal from his employment with the respondent. He had been employed from 29 July 1993 to, effectively, 11 July 2017, when his employment was terminated.

2. In the response presented to the tribunal on 1 March 2018, it is denied that he was unfairly dismissed and, if he was unfairly dismissed, there should be no order for either reinstatement or re-engagement. Further, that the claim form was presented out of time.

The issues

1. At the preliminary hearing held on 29 June 2018 by Employment Judge Bartlett, the case was listed for a preliminary hearing in public for the tribunal to hear and determine the following question:

   1.1 "Does the tribunal have jurisdiction to hear the claimant's claim for unfair dismissal?"

The evidence

2. I heard evidence from Mr David John Hunt, a partner in Farrer and Co, a firm of solicitors.

3. In addition to the oral evidence the parties adduced a joint bundle of documents comprising of 65 pages. References shall be made to the documents as numbered in the bundle.

Findings of fact

4. Th claimant was summarily dismissed and was paid three months' pay in lieu notice. The decision to dismiss was communicated to him by telephone on 11 July 2017 following a disciplinary hearing the previous day. It was confirmed in writing on 18 July 2017, which the claimant received on 21 July 2017.

5. He appealed against his dismissal and the hearing took place on 3 August 2017, but his grounds of appeal were not upheld.

6. His trade union notified ACAS on 5 October 2017 and the conciliation period ended on 3 November 2017, when an Early Conciliation Certificate was issued.

7. Mr David Hunt is a partner in the employment team at Farrer and Co, solicitors. He qualified as a solicitor in September 2001. At all material times he acted on behalf of the claimant.

8. On 27 November 2017, at 10:47am, he sent the claim form by email to London Central Employment Tribunal. (pages 34 to 59 of the bundle).

9. He received an automated email response from Her Majesty's Courts and Tribunals Service, London Central Employment Tribunal, one minute later in which it stated the following:

> "Thank you for your email which has been received by the London Central Employment Tribunal. If you have been allocated a case number it is essential that this is quoted on all your correspondence and in the subject box of your email.
>
> When sending any correspondence to the tribunal (except when making a request for someone to give evidence at a hearing) you must also send a copy to all other parties and ensure that this is made clear to the tribunal in your correspondence. If you have not copied the other parties in to your correspondence, you should say that to the tribunal, and explain why. The tribunal will then consider your explanation, and let you know if you need to take any further steps.

> We aim to deal with new claims within 3-5 working days. Please note that any claim or response forms will need to be checked before they are accepted and this reply is only confirmation of receipt. We aim to respond to other correspondence within 10 working days; however, if your correspondence is in relation to a hearing due to take place within 10 working days it will be treated as a matter of priority.
>
> Bundles for hearings cannot be accepted by email and therefore must be provided in hard (paper) copy. Parties must also ensure that sufficient copies of paper bundles and indeed any other documents are available for the hearing, and should not be sent into the office in advance of the hearing.
>
> If your enquiry relates to the details of your claim, then please contact the relevant tribunal office…. For general enquiries on claims, processes or for information on how employment tribunals operated, guidance can be found at…. For information of the services provided by ACAS please phone the helpline…"

10. According to Mr Hunt, having read the third paragraph of the automated response, he was of the view that he was able to present the claim by email. As it acknowledged receipt of the claim form. He further stated in paragraph 9 of his witness statement:

> " 9 If it was not for acknowledgement that the claim had been validly received in the automated response, I would have had a further 6 days in which to file the claim by hand by 3 December 2017 deadline. However, given the response, I was entirely reassured and believed I had correctly presented OC's claim"

11. It is difficult to see how Mr Hunt could be reassured because if read correctly, the automated response states if was confirmation of receipt of the email and not an acceptance of the claim. I was not taken to any document showing that within the following six days from confirmation of receipt did the tribunal accept the claim form as having been validly presented.

12. Mr Hunt presented two further but different claims to the tribunal by email in December 2017, but they were rejected on 9 January 2018 because the email submission was not a valid way of presenting a claim. Claims had to be presented in accordance with the Presidential Practice Direction, issued on 2 November 2017, which states that a claim form will be validly presented if done in one of three ways:

    12.1 "Online by using the Online Form Submission Service provided Her Majesty's Courts and Tribunal Service, accessible @ www.Employment Tribunals.service.gov.uk"

    12.2 "By post to: Employment Tribunals Central Office (England and Wales) PO Box 10218, Leicester, LE1 8EG".

    12.3 "A claim may also be presented in person to an Employment Tribunal office listed in the schedule to this Practice Direction (and exceptionally by email to such an office only during the period 26 July 2017 to 31 July 2017 inclusive and otherwise)."

13. Although there was no rejection of the claimant's claim form by the London Central ET, having been made aware that the automated response received was inconsistent with the requirements of the Presidential Practice Direction, a further claim form was presented by Mr Hunt and accepted on 11 January 2018.

14. In cross-examination Mr Hunt candidly acknowledged that he had seen the Practice Direction for the first time during the hearing. (64)

15. I was satisfied that the Presidential Practice Direction makes it quite clear that it is only the online claim form that will be accepted and not an email of the claim form sent to the tribunal. Further, in the explanatory information that accompanies the claim form, it refers to the _Presidential Guidance to "enable the parties to better understand what is expected of them and what to expect of the tribunal, to improve consistency in the way employment tribunal manage cases." It also gives the link to the Presidential Guidance. (5)

16. In addition, the Employment Tribunal's Guidance on presenting a claim, under "Where to send your claim", states the following:

> "We cannot accept your claim unless it is on an approved (prescribed) form provided by HM Courts and Tribunals Service. It is very important that you use the approved form. The form is available in the following formats:
>
> - An online version for submitting your claim can be found at http://www.employment tribunals.service.gov.uk" (15)

17. On page 13 of the guidance it states,

> "If you are submitting a claim electronically, the claim form will be automatically routed to the correct office." (17)

18. Mr Hunt said that he could not recall reading the Employment Tribunal's "Making a Claim to an Employment Tribunal" and believed that the above reference to making a claim "electronically" supported his mistaken view that claim forms could be presented by email.

19. In giving evidence I find that he has been a truthful witness who did not attempt to mislead me and was honest about his mistakes.

Submissions

20. I heard detailed oral submissions from Mr Brittenden, Counsel on behalf of the claimant, and from Mrs Kirk, Solicitor on behalf of the respondent. They also provided detailed written submissions with authorities. I do not propose to repeat their submissions herein having regard to rule 62(5) Employment Tribunals (Constitution and Rules of Procedure) regulations 2013, as amended. Their written submissions accurately reflect their respective positions.

The law

21. Rule 8(1) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, Schedule 1, as amended, states in relation to presenting a claim, the following:

> "(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under Regulation 11 which supplements this rule."

22. Regulation 11 gives the President of Employment Tribunals, the power to issue Practice Directions.

23. Rule 85(2) states:

> "(2) A claim form may only be delivered in accordance with the practice direction made under Regulation 11 which supplements Rule 8."

24. Section 111(1) Employment Rights Act 1996 provides that an unfair dismissal claim may be presented to an Employment Tribunal.

25. Section 111(2) states that an Employment Tribunal shall not consider a complaint under this section unless it is presented to the tribunal ---

> "(a) before the end 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."

26. Under s.207B ERA, the claimant notified ACAS on 5 November 2017, Day A, and the Early Conciliation Certificate was issued on 3 November 2017, Day B. In accordance with s.207B (4) ERA 1996, the claimant was then required to submit his claim to the tribunal within one month of Day B, namely by 3 December 2017, Haque v Luton Borough Council [2018] UKEAT/0180-17-1204.

27. The claim form was presented on 11 January 2018 out of time. The question is whether it was not reasonably practicable for it to have been presented within time?

28. The claimant bears the burden of proving both that it was not reasonably practicable for him to have presented his claim in time and that he presented it within a reasonable time.

29. In the case of Dedman v British Building and Engineering Appliances Limited [1974] ICR 53, the claimant was summarily dismissed. He knew he had some rights under the relevant statute at the time but did not know about the limitation period. He sought advice from a firm of solicitors, but they did not advise him as to the time limit. He presented his claim form out of time. He failed in his application that he be allowed to pursue his unfair dismissal claim as it was not "practicable" for the claim to have been presented in time as he was unaware of the time limit and had sought legal advice but was not told about the time limit. The case was considered by the Court of Appeal.

30. Lord Denning MR, held that, "If a man engages skilled advisers to act for him and they mistake the time limit and present it too late, he is out. His remedy is against them.", page 61, paragraph F.

31. A claimant may know of his or her rights but prevented from exercising them through either "illness, absence, some physical obstacle, or by some untoward an unexpected turn of events" which would make it not practicable to have presented the claim in time. Where the claimant is pleading ignorance of the law, questions had to be asked as to what were his or her opportunities for finding out their rights? Did they take them? If not, why not? Were they misled or deceived? Were there acceptable explanations for a continuing ignorance of the existence of their rights? Ignorance of his or her rights does not mean that it was impracticable for him to present a complaint in time, Scarman LJ, page 64, paragraphs D to F.

32. In the case of Walls Meat Company Limited v Khan [1978] IRLR499, it was held that it would not be reasonably practicable if there was "some impediment which reasonably prevents, or interferes with, or inhibits, such performance" namely the presentation of a complaint. The impediment may be physical, for instance the illness of the complainant or a postal strike; or the impediment may be mental, 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 the period of three months, if the ignorance on the one hand, or the mistaken belief on the other, is itself reasonable", BrandonLJ, page 502 paragraph 44.

33. In the case of Riley v Tesco Stores Limited [1980] IRLR103, the claimant was dismissed for either alleged theft from, or receiving property belonging to the respondent. On the day of her dismissal she visited a Citizens Advice Bureau "CAB" where a claim form was completed claiming unfair dismissal. Six days later she was charged by the police. She alleged that subsequently she was told by the CAB that she could not present her claim until the criminal proceedings were completed. Ten months later she was acquitted of the charge against her. Within eight days of her acquittal she presented her claim to an Employment Tribunal. She argued before the ET that her failure to make a complaint in time was because of incorrect advice by given by the CAB. The ET rejected that argument and relied on the fact that she engaged the services of the CAB as "skilled advisers" and acted on their advice. This was upheld by the Employment Appeal Tribunal. On appeal to the Court of Appeal, Waller LJ held that:

> "What is the position if, knowing of your right, you ask another to take the necessary action? In my opinion, you cannot then be in a better position than if you had retained the power to act yourself. If you have retained a skilled adviser and he does not take steps in time, you cannot hide behind his failure. There may be circumstances, of course, where there are special reasons why his failure can be explained as reasonable."

34. In London International College Limited v Sen [1993] IRLR333, the Court of Appeal held, on the facts, that a claimant had been entitled to rely on incorrect advice from a tribunal employee when presenting a late claim, with the effect that it had not been reasonably practicable to have presented it within time. What was important was to establish the substantial cause of the delay. The tribunal found that the advice from a member of the Tribunal staff had followed very shortly after the advice from the solicitor that the substantial cause of the lateness was what was said by the member of staff, rather than by the solicitor. The tribunal had jurisdiction to hear the claim although it was one day out of time.

35. In the case of Adams v British Telecommunications Plc [2017] ICR382, Mrs Justice Simler, President, held:

> "19 The question for the tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the claim form on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error, since she had been aware of it no doubt she would not have made it or it would have been corrected".

36. In the case of Jean Sorelle Ltd v Rybak [1991] IRLR 153, the EAT held, Knox J, that an ET had not erred in holding that wrong advice from an ET employee as to when the three-months' time limit expired for presenting an unfair dismissal complaint rendered it not reasonably practicable for the claimant to have presented the claim in time.

37. A similar view was taken by the EAT in the case of DHL Supply Chain Ltd v Fazackerley UKEAT/0019/18, where an ACAS helpline officer erroneously advised the claimant to exhaust the internal appeal process before presenting his claim, HH Judge Barklem.

38. In the first instance case of Scannell v Ganymede Solutions Ltd, Case No: 1600562/2017, the Regional Employment Judge in Cardiff, allowed a claim of constructive unfair dismissal out of time based on erroneous advice from tribunal staff that claims by email was an acceptable method of presentation following the temporary outage of the online submission.

39. In the case of Palmer v Southend-on-Sea Borough Council [1984] ICR 372, it was held that the test of "reasonably practicable" means "Was it reasonably feasible" to present the complaint within three months?

40. In Northamptonshire County Council v Entwistle [2010] IRLR 740, a case under the Employment Act 2002 (Dispute Resolution) Regulations 2004, in which the claimant's solicitor relied on the three months statutory time limit within which to present an unfair dismissal claim, as starting from the outcome of an internal appeal and not from the date of dismissal. The claim was presented two weeks out of time. The ET allowed it to proceed as it was presented within a reasonable time notwithstanding the solicitor's error. The EAT allowed the employer's appeal. It held that the claimant's solicitor had been negligent in not correcting the employer's misleading appeal outcome letter in relation to the time within which the claimant should present his claim to an ET. It distinguished Sen from the facts in that case.

41. I have also considered the cases of The Governing Body of Sheredes School v Davies UKEAT/0196/16/JOJ; Marks & Spencer plc v Williams-Ryan [2005] IRLR 562; and Consignia plc v Sealy [2002] IRLR 624.

Conclusion

42. This is a case in which the parties agree and I do concur, that the claimant is not at fault. He had engaged the services of Farrer & Co, as his skilled legal advisers. I must, therefore, have regard to their conduct, in particular, Mr Hunt's conduct of the case.

43. Mr Brittenden urged upon me to consider this case a "a-typical" because of the automated response, but in my view there is nothing unusual or exceptional about this case. Mr Hunt is a partner in Farrer & Co and is an experienced legal practitioner. He is deemed to know about employment law and procedure.

44. The automated response from HMCTS clearly states, "Please note that any claim or response forms will need to be checked before they are accepted and this reply is only confirmation of receipt." As such, on the construction of the document, it was not an acceptance of the claim form but an acknowledgement of it having been received by the tribunal.

45. Mr Bittenden further submitted that the automated response misrepresented the true position that new claims could be presented by email. That may very well be the case if it operated on the mind of a litigant in person but not on an experienced employment lawyer. Even if the automated response was misleading, which I do not accept, it cannot take precedence over the Presidential Practice Direction issued under a statutory provision. The automated response has no statutory force and Mr Hunt either should have or ought to have known the difference.

46. I accept Mr Hunt's evidence that the material cause for the claim form being presented out of time was his reliance on the automated response. Mr Brittenden relied on the judgment of Mrs Justice Simler, President of the EAT, as she then was, in the Adams case. I have to consider whether Mr Hunt's mistaken belief that he had correctly presented the first claim in time and did not need to put in a second claim, was reasonable having regard to all the facts and circumstances? Simler J also added that it must be assumed that the error was genuine and unintentional.

47. Applying Adams I do not accept that Mr Hunt's mistaken belief was reasonable. I accept that it was genuinely held and unintentional. I have taken into account the facts and circumstances of this case. Mr Hunt is a skilled adviser working in his firm's employment team. He had at the time he submitted the claim form, nearly sixteen years post qualification experience. He failed to have regard to the wording in Employment Tribunal's guidance on "Making a Claim to an Employment Tribunal", in which it clearly states that an online version of the form is one method in which a claim will be accepted by the tribunal. He cannot rely on the reference in the guidance to sending the form "electronically" as including by email, in support of his mistaken belief if he did not recall reading the guidance.

48. In any event, Mrs Kirk, on behalf of the respondent, quite properly and accurately submitted that the guidance makes no reference to email submission being acceptable.

49. I have also taken into account the fact that the Presidential Practice Direction which Mr Hunt did not read prior to the claim form being sent, emphasised the three ways in which a claim from can be presented: by use of the online form; by post; or in person. Reference to an email submission is not mentioned nor is it mentioned as an acceptable method in the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The claimant was entitled to expect that Mr Hunt would be familiar with the rules, the guidance and the practice direction. Had he read these documents he would have realised that the wording in the automated response cannot take precedence over the Presidential Practice Direction.

50. I also find that Mr Hunt was not suffering from one or more of the impediments described in the Dedman and Walls Meat cases.

51. I have come to the conclusion, taking the above matters into account, that it was reasonably feasible for the claim form to have been presented in time if Mr Hunt had read the relevant documents in his capacity as a skilled employment law practitioner. I, therefore, do not go on to consider whether it had been presented within a reasonable time on 11 January 2018.

52. In my view the case of Scannell can be distinguished from the facts of this case. In Scannell there was an emergency, in that the online submission computer system was down for a few days, that was not the situation in this case. In Scannell the tribunal staff gave erroneous advice to parties who acted upon to their detriment. That was not the position in this case. Neither the guidance nor the Presidential Direction had not been altered. The position has been clear, namely that the online submission claim form was only one of three ways in which it could be accepted. The automated response was not an acceptance of the claim but an acknowledgement of the email of the claim as having been received by though not accepted by the tribunal. In any event, Scannell is a first instance case and is not binding on me.

53. I also adopt the written submissions made by Mrs Kirk.

54. I have come to the conclusion that this tribunal does not have jurisdiction to hear and determine the unfair dismissal claim as it was presented out of time. Accordingly, the hearing of this case listed on 1 to 4 April 2019 will be vacated and the case management orders issued on 28 June 2018, will no longer apply.

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Employment Judge Bedeau

6 February 2019

Sent to the parties on:

6 February 2019

For the Tribunal:

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