EMPLOYMENT TRIBUNALS

Claimant:
Mr Richard Owen

Respondent:
OCS Group (UK)Ltd
sued as OCS Group

RECORD OF A PRELIMINARY HEARING

Heard at: Leeds **On: 25 January 2019**

Before: Employment Judge R S Drake (sitting alone)

Appearances
For the Claimant: In person
For Respondent : Ms Amy Smith (of Counsel)

RESERVED JUDGEMENT ON PRELIMINARY ISSUE

1 The claim having been presented on 1 November 2018 is out of time by 54 days (taking account of the period from 27 June 2018 to 9 August 2018 covered by the Claimant's ACAS Early Conciliation Certificate) thus causing the expiry date for issuing proceedings to be 8 September 2018 (the "Primary Period")) in relation to resignation which he asserted to be constructive dismissal on 28 March 2018 and alleged causing events.

2 The Claimant has not established it was not reasonably practicable to issue his claim in time or that he issued within a reasonable time after expiry of the Primary Period.

3 The claim is dismissed for want of jurisdiction as the Tribunal may not hear them.

REASONS

1. I noted that this hearing was listed to consider a preliminary issue as to jurisdiction as specified by EJ Wade in her Orders date 11 January 2019. The Respondents assert that the claim was issued outside of the time limit specified by Section 111 ERA (the "Primary Period") and that the Claimant cannot show it was not reasonably practicable to issue within the Primary Period as defined by S111(2)(a) ERA and that she issued within a time the Tribunal could find reasonable thereafter.

2. After hearing evidence from the Claimant and oral submissions from both sides, I decided to reserve my decision so as to allow reasonable time for deliberation.

3. I have concluded that I do not find that the Claimant's arguments are sufficiently persuasive to discharge the onus upon him as set out by the law outlined below, but that indeed the Respondent's arguments in response are more than persuasive and are compelling to the extent that I find myself bound by the Court of Appeal's decision in **Dedman v British Building & Engineering Appliances Ltd [1973] IRLR 379**

Facts

4. I find the following: -

   a The Claimant resigned on 28 March 2018 from which date time started running and was only interrupted on the last day possible on 27 June2018 by his submission to ACAS for Early Conciliation;

   b The Early Conciliation process ended on 9 August from which date the last month of the limitation period for issuing proceedings started running again and expired thus on 8 September 2018 – the claim was presented to the Tribunal on 1 November 2018 and was thus clearly two months (less a week) out of time;

   c The Claimant was already homeless before he resigned and remained (and is today) still homeless but with access to temporary accommodation from friends and also to email and internet resources upto twice a week and also to public libraries sufficient to enable him to research his rights and time limits relating thereto of which he thus was aware before he approached ACAS;

   d He had been thus taking advice from well before the date he issued his claim, so he cannot establish ignorance of his rights or the time limits for exercising those rights;

   e He says he was suffering from mental impairment necessitating the taking of advice and seeking assistance from an organisation called the Occupational Health Advice Service ("OHAS") which advised him of the need to issue proceedings and to do so in a timely way if he so chose and that he would need to consult ACAS first;

   f He didn't produce any evidence from a Doctor to confirm his medical state or that the state he suffered went so far as to make taking advice and taking proceedings difficult (let alone not reasonably practicable) in any way and indeed if anything the opposite is clear from his own evidence since he did take advice;

   g The Claimant contacted ACAS on 27 June 2018 (prior to expiry of the Primary Limitation Period prescribed by Section 111(2)(a) ERA) receiving certification dated 9 August 2018 but only lodged his claim in this Tribunal on 1 November 2018; the Claimant's claim (as against R2) was therefore lodged just less than two months outside of the Primary Limitation Period;

   e The Claimant sought to argue that he was advised by ACAS on 9 August that the time for issuing expired three months thereafter, thus in effect that time had started running but this time from afresh which I cannot find to be advice likely to have been given as there is no evidence to support so erroneous and advice to support the Claimants assertion – I find he was mistaken about the advice he received;

   f No satisfactory explanation was advanced by the Claimant as to why he didn't issue for a full further two months other than he thought he had three months to do so and in what way they were relevant;

g The Claimant is a sophisticated intelligent person and he faced no physical or medical barriers (such as, non-exhaustively, hospitalised absence from normal life) to issuing his claim and certainly nothing put in his way imposed upon him by the Respondents so as to prevent him being able to take advice and act upon it within due time;

h He does seek to argue he was misinformed as to time limits and compliance therewith or that may have been mistaken in this respect having been in receipt of advice throughout all relevant times;

i If the claims proceeded, the Respondent would have to call many witnesses and require them to recall events and oral statements after a long passage of time in relation to the matters complained of, and would face greater difficulty in defending the Claimant's testimony than the Claimant himself would face if the claims proceeded;

j No explanation was given by the Claimant as to why it took him a further just less than two month time period after expiry to issue his claims sufficient to show such delay was not unreasonable.

The Law

7. S.111 ERA 1996 provides as follows:

(1) An employee may present a complaint to an Employment Tribunal against an employer that he was unfairly dismissed

(2) An Employment Tribunal **shall not** *(again my emphasis) consider a complaint under this section unless it is presented—*

(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.*

8. The burden of proving that it was not reasonably practicable to present a claim in time is an high threshold and rests firmly on the Claimant **Porter v Bandridge Ltd [1978] ICR 943**).

9. In **Palmer v Southend BC [1984] ICR 472** the Court of Appeal held that "reasonably practicable" does not mean reasonable, and does not mean physically possible, but means something like "reasonably feasible" . This is later elaborated by the EAT in **Asda Stores Plc v Kauser [2007] EAT 0165/07** by saying "the relevant test is not simply a matter of looking at what was possible but to ask whether on the facts of the case as found, it was reasonable to expect that which was possible to have been done"

10. I accept that it is trite law that where a Claimant is misadvised on limitation by a skilled advisor, the Claimant will be fixed with his advisor's default. As Lord Denning expressed in **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53** at para 18, authoritatively approved most recently as a proposition of law by Lord Phillips MR in **Marks & Spencer Plc v Williams-Ryan [2005] ICR1293** (with emphasis added):

*" … **What is the position if he goes to skilled advisers and they make a mistake? The English Court has taken the view that the man must abide by their mistake**. There was a case where a man was dismissed and went to his **trade association** for advice. They acted on his behalf. They calculated the four weeks wrongly and posted the complaint two or three days late. It was held that it was 'practicable' for it to have been posted in time. He was not entitled to the benefit of the escape clause.* [*See* **Hammond v Haigh Castle & Co Ltd [1973] IRLR 91**]. *I think that was right. **If a man engages skilled advisers to act for or advise him – and they mistake the time limit and it is presented too late – he is out. His remedy is against them** … "*

11. I am aware of the following paragraph from **Williams-Ryan**, where at Paragraph 47, Lord Justice Keene said (again emphasis added) referring to the CAB but which I infer could just as appropriately be said of ACAS in the present case:

> " … *I would emphasise the importance of recognising that this is not a case … where the employee received advice from the CAB to await the outcome of the internal appeal procedures before making a complaint to an Employment Tribunal. The Employment Tribunal, in its Extended Reasons, records that in the short telephone conversation Ms Williams-Ryan had with someone at the CAB, there was, so far as she could remember, no discussion about taking a complaint to an Employment Tribunal. Nor does one know what questions the CAB staff member was asked during the course of that conversation.* ***This, therefore, is not one of those cases where an employee has been wrongly advised by a skilled adviser, nor one where it seems likely that the employee had a remedy against that adviser***".

12. By contrast, Claimant in the present case was advised at a relevant time, i.e. on 9 August 2018. **Williams-Ryan** does not therefore support the Claimant's arguments that it was not reasonably practicable to advance his claim in time. If the Claimant was wrongly advised by ACAS, then his claim rests there in the words of Denning MR in **Dedman**.

Conclusions

13. The Effective Date of termination of employment and thus the starting point for the running of time for the purposes of Section 111 was 28 March 2018. This is common ground for both parties. The Primary Time Limit expired 27 June 2018 but in this case was extended by early conciliation sought via ACAS commencing on 27 June 2018 and ending on 9 August 2018 thus causing the expiry date of the Primary Period to extend to 8 September 2018

14. Further, I find that an unexplained or at best an unsatisfactorily explained delay occurred thereafter. All the Claimant can say is that he understood he was advised that he had three months from 9 August 2018 which was wrong and I do not find that this was indeed the advice he received but rather that he misunderstood it. I am supported in this finding in that he doesn't say he was told a specific date for expiry of the Primary Period which I would have expected if ACAS had indeed advised that time had started running afresh. It cannot do so in Law.

15. There is no other explanation given by the Claimant and no change in circumstance which made ability to take action, advice and act for himself into an inability to do so such that it was not reasonably feasible to issue proceedings before 8 September 2018 No evidence is available to show that a further delay of nearly two months meant that issuing on 1 November was within a reasonable time after 8 September 2018.

14. The Claimant's claim is clearly out of time, about which there can be no argument at all. His case today does not sufficiently explain why and doesn't go anywhere near establishing it was not reasonably practice able to issue in time. It is clear from the authorities referred to in all the relevant submissions before me that his error of judgment as to time limits was no more than that, despite access to a skilled adviser, and is insufficient to show that it was not reasonably practicable for him to have brought her claims in time.

15. The case of **Willams-Ryan** supports the Respondents' arguments today: that the Claimant had a skilled adviser and that it was therefore reasonably practicable for him to lodge his claim in time. Though the Claimant in **Williams-Ryan** (where she had CAB advisors) succeeded, the facts in that case are clearly distinguishable from the present case (ACAS). In any event I am still bound by **Dedman** on ordinary principles of the law of precedent.

16. The Claimant's undoubted domestic distress causing a diversion of attention from the time limits is not supported by evidence and is therefore also insufficient to render it not reasonably practicable for him to have lodged his claim in time. He is further handicapped in this respect by an absence of cogent medical evidence.

17. I judge the balance of prejudice to favour the Respondents as is clear from my factual finding above.

18. The Claimant faces the burden of proof and he must (1) prove to the Tribunal that it was not reasonably practicable for him to have brought his claims in time; and (2) persuade the Tribunal that there are exceptional reasons justifying the extension of the time limit for bringing the claims. I find there is no valid basis for the Tribunal to accede to any of these applications for the reasons given above having taken all evidence and submissions into account.

19. The claim is time-barred and is therefore struck out for want of jurisdiction.

Employment Judge R S Drake

DATE: 4 February 2019