EMPLOYMENT TRIBUNALS

Claimant: Mrs J Randerson

Respondent: FCC Recycling (UK) Limited

HELD AT: Sheffield **ON:** 17 May 2018

BEFORE: Employment Judge Little

REPRESENTATION:

Claimant: Claimant not in attendance (written representaions)
Respondent: Miss Barry of Counsel (instructed by Wrigley Claydon)

JUDGMENT

My Judgment is that the claim be dismissed because the Tribunal does not have jurisdiction.

REASONS

1. At what would have been a merits hearing on 6 April 2018 it was realised that the claim had probably been presented out of time. In that claim the claimant complained that she had been unfairly dismissed. My provisional reasons for considering that the claim had been presented out of time and the reasons that that issue was not dealt with on 6 April but reserved to today are in each case set out in the written reasons I gave for the April order.

2. **The preliminary point**

   From the claimant's written representations it is to be noted that they accept that the claim had been presented out of time. The claim had originally been rejected because the name of the respondent within the claim form did not match the name of the proposed respondent in the ACAS early conciliation certificate. That

defect was subsequently remedied and the rejection reconsidered with the result that the claim was accepted, but it was to be treated as having been accepted (presented) on 4 December 2017, rather than the original date of presentation which was 17 November 2017.

The last date for presenting the claim in time would have been 28 November 2018. That date was calculated by reference to the provisions of the Employment Rights Act 1996 section 207B(3). I have taken into account the decision of the Employment Appeal Tribunal in **Luton Borough Council v Haque** which was handed down on 12 April 2018 as to the inter-relationship between section 207B(3) and subsection (4). However that does not alter the fact that the only extension to which the claimant was entitled was that to 28 November 2017.

3. **Reasonable practicability**

This is the primary issue for me today. Was it reasonably practicable for the claim to have been presented in time? If not, the secondary question would be whether the actual date of presentation was reasonable.

3.1. The materials before me today

Neither the claimant nor her solicitor have attended today's hearing. In the reasons I gave for the April order I indicated that if the claimant's solicitor (who did not attend that hearing either) was content for the matter to be decided without a hearing but on the basis of written submissions then, having liaised with the respondent's solicitor and informed the Tribunal accordingly, that would be an option. In fact the Tribunal received a letter from the claimant's solicitors dated 1 May 2018 and that enclosed written representations

"for consideration at the hearing"

We trust that you will take the appropriate action."

It was therefore unclear whether the claimant's solicitors were going to attend to make oral submissions. In the event they have not.

3.2. My comments on those written representations

In paragraph 1 the solicitors refer to the ACAS early conciliation certificate being issued by ACAS in the name of FCC Environment UK Limited. That might suggest that some error had been made on the part of ACAS. However it seems that that company (as it turned out the incorrect respondent) would have been the one specified by the claimant when she sought ACAS early conciliation.

The solicitors go on to note that the respondent was named in the claim form as FCC Recycling (UK) Limited and they go on to explain why there was some doubt as to who the claimant was employed by. The solicitors go on to submit that "both companies in question are one and the same". Manifestly that is not the case. They are two separate entities. One is not a trading name of the other.

The submissions go on to suggest that the Tribunal communicated the initial rejection of the claim by an email "which was received on 15 November 2017". Obviously that is not the correct date. The original claim had not

been presented until 17 November 2017. The correct date of the Tribunal's letter sent by email was 22 November 2017.

In fairly brief terms, paragraph 7 of the written representations goes on to explain the reasons for the delay in the solicitors responding to the rejection. First there is reference to "illness of a member of staff". However there is no indication of who this member of staff was and what their status was. Was it a member of the secretarial/administrative team or was it the relevant fee earner? There is no mention of how long what was presumably an absence because of illness lasted.

The second reason offered for the delay is that the Tribunal's email (of 22 November 2017) "was quarantined amongst other emails as a security threat" so that the rejection of the claim was not "immediately detected". Presumably this means that the email from the Tribunal went into the "junk" box on the respondent's solicitors system. In my judgment a firm of solicitors dealing with litigation should have had a system to ensure that correspondence from Her Majesty's Courts and Tribunals Service either did not automatically go into "junk" or if it did, that there was the appropriate monitoring to ensure that important messages were read and actioned without delay. As I do not have the benefit of oral submissions from the claimant's solicitors today I have no further information as to how their mail system operates and what checks and procedures are in place.

The claim form had originally been presented 12 days before the time limit would expire. It could reasonably have been expected that a firm of solicitors would have a system of ensuring that claims presented close to the expiry of the limitation period would be checked to ensure that proceedings had been properly instituted. In any event the claimant's solicitors should reasonably have been aware that they had not successfully presented their client's claim when they received (but failed to read) the Tribunal's email of 22 November 2018. At that point they would have had to have acted quickly because they only had six remaining days within which to rectify the defect, seek a reconsideration and ensure that the claim had been validly presented. In fact it seems that no action was taken until 4 December 2017 by which date limitation had expired some six days earlier. Again I have no explanation as to how, precisely, the Tribunal's email of 22 November only came to the solicitor's attention on 4 December.

4. **Conclusions**

Whilst I accept that there was some genuine confusion as to which company employed the claimant and so should be the respondent, one might expect that solicitors would be better equipped than a lay person to make the appropriate checks – inspecting the contract of employment, pay slips and conducting company searches – before ACAS were involved and before the proceedings were then commenced. Although it is not in my power to take any different action at this remove, I am satisfied that the original decision of Employment Judge Cox to reject the claim as presented on 17 November 2017 was correct. For that matter so too was the decision of Employment Judge Maidment to grant the reconsideration and treat the claim as having been presented on 4 December 2017.

Because the claimant had instructed solicitors to advise her generally and to commence proceedings on her behalf I am satisfied that it would have been reasonably practicable to have presented (or re-presented) the claim in time. That would have been achieved by having appropriate contingency plans if a member of staff undertaking such critical work was absent and by having a proper system for identifying and acting upon important correspondence even if the computer had decided that it was "junk" or a security risk. Further reasonably competent solicitors would have had a system for ensuring that claims, particularly those issued close to the limitation period, had in fact been validly issued/presented.

Employment Judge Little
Date 29th May 2018

Note - Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.