EMPLOYMENT TRIBUNALS

Claimant:
Mrs Stacie Fenton

Respondent:
(1) Direct Carers Ltd (in Creditors Voluntary Liquidation)
(2) Deborah Stock

RECORD OF A PRELIMINARY HEARING

Heard at: Kingston upon Hull **On: 29 June 2018**

Before: Employment Judge R S Drake (sitting alone)

Appearances
For the Claimant: Mr S Holborn (Consultant)
For Respondent (1): Not represented
For Respondent (2): In person

RESERVED JUDGEMENT ON PRELIMINARY ISSUE

1 The claims (as against the second Respondent ("R2")) having been issued on 18 January 2018 are out of time by 12 days (taking account of the period from 8 November 2017 to 6 December 2017 covered by the Claimant's ACAS Early Conciliation Certificate) thus causing the expiry date for issuing proceedings to be 6 January 2018) in relation to resignation which she asserted to be constructive dismissal on 5 September 2017 and alleged causing events.

2 The Claimant has not established it was not reasonably practicable to issue her claims in time or that she issued within a reasonable time after expiry of the Primary Limitation Period.

3 The claims (and all of them) are 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 Maidment in his Orders date 14 May 2018. I also noted that the claims expressed as against the First Respondent ("R1") could not proceed because of their insolvency status but that the claims under Section 47(B) of the Employment Rights Act

1998 ("ERA") could proceed as they sound against R2 as to detriment alleged to be occasioned by the Claimant making a qualifying public interest disclosure, subject to application of Section 48 as set out below. R2 asserts that such claims were issued outside of the time limit specified by Section 48 ERA.

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 of complex evidence.

3. I have concluded that I do not find that the Claimant's arguments are persuasive in any way, or sufficiently to discharge the onus upon her 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 made a written complaint to R1 on 14 July 2017 in terms and about a subject she regarded as the making a qualifying public interest disclosure and that thereafter she was exposed to disbelief, disciplinary process and dismissal of appeals against grievances she raised and that she asserted that all these amounted to detriment leading to her resigning in response to such detriment;

   b The Claimant started taking advice from her current representative Mr Holborn on or about 18 August 2017 and was thus in receipt of competent legally qualified advice at all relevant times thereafter to date;

   c After dismissal of her grievance outcome appeal on 4 September 2017, she wrote to R1 a letter which included the following terms :-

      " … your actions … have breached the trust and confidence I had with my employer … I have therefore been left with no option but to leave on the basis of constructive dismissal … "

      R1 replied by inviting the Claimant to withdraw what they took to be a resignation having immediate effect but she did not reply. Therefore, R1 took it that her resignation stood as of 5 September 2017, and then paid the Claimant her salary and holiday pay due upto that date in the pay run at the end of that same calendar month and at the same time sent her p45

   d The Claimant contacted ACAS on a first occasion on 8 November 2017 (prior to expiry of the Primary Limitation Period prescribed by Section 48 ERA) receiving certification dated 6 December 2017 and lodged her claim in this Tribunal on 18 January 2018; the Claimant's claim (as against R2) was therefore lodged 14 days outside of the Primary Limitation Period;

   e The Claimant sought to argue that she made subsequent referrals to ACAS which were relevant to these claims, but no explanation was advanced as to why and in what way they were relevant;

   f The Claimant is a sophisticated self-taught compliance specialist and can be considered in my judgment to have special knowledge of the importance of time

limits in compliance situations and though she was no doubt suffered hurt and distress, as all Claimants do, even to the extent of her marriage being prejudiced by her circumstances, she faced no physical or medical barriers (such as non-exhaustively hospitalised absence from normal life) to issuing her claims and certainly nothing put in her way imposed upon her by the Respondents so as to prevent her being able to take advice and act upon it within due time;

g She does not seek to argue she was misinformed or misled as to time limits and compliance therewith but rather she may have been mistaken in this respect having been in receipt of advice throughout all relevant times;

h If the claims proceeded, R2 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 she (R2) would face greater difficulty in defending the Claimant's testimony than the Claimant herself would face if the claims proceeded;

i No explanation was given by the Claimant as to why it took her a further 14 days after expiry to issue her claims sufficient to show such delay was not unreasonable.

The Law

7. S.48 ERA 1996 provides as follows:

(1) A worker may present a complaint to an Employment Tribunal that he has been subjected to a detriment in contravention of section 47B(1) ….

(3) 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 date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, 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. 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 her advisor's default. As Lord Denning expressed in **Dedman** 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 him – and they mistake the time limit and present it too late – he is out. His remedy is against them*** *… "*

10. I am aware of the following paragraph from **Williams-Ryan**, where at Paragraph 47, Lord Justice Keene said (again emphasis added):

> " … *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****".*

11. By contrast, Claimant in the present case was represented at all relevant times from August 2017 to date. **Williams-Ryan** does not therefore support the Claimant's arguments that it was not reasonably practicable to advance her claims in time. If the Claimant was wrongly advised by her legal advisor, then her claim rests there in the words of Denning MR in **Dedman**.

12. Further, the EAT's decision in **HMRC v Garau [2016] UKEAT/0348/16** is authority for the proposition that only a first referral to ACAS has the effect of stopping the running of the Primary Limitation Period clock. Accordingly, the clock was stopped on 8 November 2017 and started again 6 December 2017. Thus, on that basis as set out above the Primary Limitation Period as extended expired 4 January 2018 and thus 14 days before she issued her claims in Tribunal.

Conclusions

13. The Effective Date of termination of employment and thus a possible starting point for the running of time for the purposes of Section 48 was 5 September 2017. This is clear from the unequivocal wording of the Claimant's message of that date and is thus to be judged subjectively and was clearly treated as such by the respondents as they sought to persuade the Claimant to recant. One cant recant something that hasn't been done so clearly the Respondents treated the message of 5 September as immediate resignation as no reference is made to notice being given.

14. Further, I find that an unexplained and evidentially unjustified delay of 14 days does not show that the claims were brought within a reasonable time after the expiry of limitation. It is open to any Claimant pursuing a whistle-blowing complaint to do so even before termination of employment and in this case no complaint was made to a Tribunal shortly or even within three months of the very act of disclosure made by the Claimant which was thus a possible second and thus earlier trigger point for starting time running. Waiting to see how an internal process runs out is not an adequate explanation for not issuing a claim

to Tribunal sooner than January 2018 when the matter complained of occurred in June 2017.

14. The Claimant's claims are clearly out of time, about which there can be no argument at all. Her 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 her error of judgment as to time limits was no kore than that despite access to a skilled adviser, and is insufficient to show that it was not reasonably practicable for her 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 her to lodge her claim in time. Though ther Claimant in **Williams-Ryan** (where she had CAB advisors) succeeded, the facts in that case are clearly distinguishable from the present case (legal adviser and representatives). In any event I am still bound by **Dedman** on ordinary principles of the law of precedent.

16. The Claimant's undoubted confusion and distress causing a diversion of attention from the time limits are not therefore sufficient to render it not reasonably practicable for her to have lodged her claim in time.

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 she must (1) prove to the Tribunal that it was not reasonably practicable for her to have brought her ERA 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 claims are time-barred and are therefore struck out for want of jurisdiction.

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Employment Judge R S Drake

06/07/2018