Case No. 1302317/2018 and 1301441/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Miss C Kelly	**AND Fedex Express UK Limited**
Claimant	**Respondents**

HELD AT Birmingham ON 30 January 2019

EMPLOYMENT JUDGE Self

Representation

For the Claimant: Mr R Ennis - Solicitor

For the Respondent: Mr C Adjei - Counsel

RESERVED JUDGMENT

1. The Respondent's application for a reconsideration of the decision to accept Claim No. 1302317/18 is successful and the decision made on 2 July 2018 is varied so that the Claim is rejected as opposed to being accepted.

2. The only remaining Claim before the Tribunal is Claim No.1301441/2018 lodged on 11 July 2018 and upon the Tribunal finding that the claims have been lodged out of time:

   a) The Claims of unfair and wrongful dismissal are dismissed upon the Tribunal finding that it has no jurisdiction to deal with the Claims as it was reasonably practicable for the said claims to have been brought in time.

   b) The Claim of Disability Discrimination shall proceed to a final hearing because the Tribunal finds that it would be just and equitable for time to be extended.

3. This matter will be listed for a Closed Preliminary Hearing with a time estimate of 2 hours on a date convenient to the parties.

WRITTEN REASONS

1. This is a Preliminary Hearing on the Claimant's claims of unfair dismissal, wrongful dismissal and disability discrimination. So far as the substantive claims are concerned the Claim appears to be relatively straightforward involving the Claimant's long-term sickness absence arising from, what the Claimant asserts, was her disability. Indeed, at first blush, the issue for which this PH has been convened, namely whether or not the claims were brought in time and if not whether it was reasonably practicable to have brought the claims in time or whether it was just and equitable to extend time, also appear straightforward.

2. On this occasion however first impressions are misleading and there are Difficulties that flow from the impact of Early Conciliation (EC) and steps that need to be followed because of EC.

3. Much of the chronology is common ground. The Claimant's effective date of termination (EDT) is agreed as being 21 December 2017, thereby making the basic limitation date (before considering the impact of EC) the 20 March 2018. EC was commenced on 16 March and concluded without resolution on 16 April 2018 when the necessary certificate was issued. By virtue of section 207B (4) ERA the last date upon which claim could be lodged was 16 May 2018.

4. On 14 May 2018 the first Claim was lodged at the Tribunal. It was submitted online. On the face of the document there does not appear to be anything out of the ordinary or problematic about the lodging of the Claim.

5. At the present time there are a substantial number of Claims being filed at the Tribunal following the decision to remove the payment of fees as a precondition of bringing a claim. The result is that delays are occurring at a number of stages in the system including the processing of claims and moving them on to a hearing. The causes are well-known, and steps are being taken to remedy the situation. In this case the result was that even though the Claim was lodged on 14 May 2018 it was not vetted by the administration staff until 23 June 2018.

6. The member of staff processing the Claim noted:

   "Cert No, appears to be invalid. Shall we request correct cert no. before proceeding with claim."

7. The file was passed to an Employment Judge for consideration who wrote back to the staff member:

   "Phone C's solicitor and ask for a copy of the EC Certificate to be e-mailed to us and refer back. If not done within 48 hours refer back"

8. In fact, that request to the Claimant's solicitor was not made until 2 July 2018 and the EC Certificate was provided upon return.

9. That certificate stated that the EC number was R225539/18/71. The Claim Form stated that the EC Certificate was R225539/18/17. There was an error on the Claim Form whereby the last two digits of the EC number had been transposed. This hearing and the attendant difficulties have been caused and flow from that error.

10. The Claim Form was re referred to an Employment Judge.in the following terms:

    "Shall we 1) Serve 2) List for CPH – 2 hours. Your Instructions please"

11. The response from the Employment judge was as follows:

    "Inform C rep claim is deemed to be accepted on date EC No. provided. Rule 13 (4) given no EC number provided. The claim for udl, wages, discrimination would appear to be out of time. The claim should be listed for an open PH time estimate 3 hours to consider the time points".

12. On the following day (3 July 2018) an Acknowledgement of Claim was sent to the Claimant's solicitors referring to the first three paragraphs of what was written above. It was only sent to the Claimant's representatives. The Respondent was not, therefore, specifically alerted about the issue with the EC number.

13. On the same date an ET2 was sent to both parties stating that the Claim had been accepted and giving the Respondent until 31 July 2018 to lodge its Response. Also, on that day a notice of hearing was sent out notifying the parties about the Open Preliminary Hearing returnable today.

14. The Claimant's solicitors lodged an identical claim on 11 July 2018 (the 2nd claim). It was made quite clear on that Claim that this 2nd Claim was lodged without prejudice to the Claimant's primary contention that the Claims be listed together on 30 January 2019. After some correspondence an Acknowledgement of Claim was sent out on 4 September along with a Notice of Claim form stating that a response was required by 2 October 2018.

15. On 28 September the Respondent wrote to the Tribunal stating that in their view the defect to the first Claim was such that the Claim should have been rejected and returned to the Claimant in accordance with Rule 10 (1)(c)(i) of the 2013 Tribunal Rules and that the 1st claim simply could not continue. The 2nd Claim was alleged to have been lodged well out of time.

16. There had been a Response to the 1st claim lodged on 31 July 2018 and a Response lodged to the 2nd Claim on 28 September 2018. In the Grounds of resistance for Claim 1 no issues were taken in respect of jurisdictional issues linked to EC.

17. The Respondent's letter of 28 September was considered by an Employment Judge when the matter was referred and, although not communicated to the

parties, there is a note on the file that said that the issues raised would be considered at the PH. That is the history of the matter prior to today.

18. Rule 8 of the 2013 Rules states that a claim shall be started by presenting a completed Claim Form. Under Rule 10 (1)(c)(i) the Tribunal shall reject a claim if it does not contain, inter alia, an EC number.

19. Rule 10(2) specifies that the Claim Form should be returned to the Claimant with a notice of rejection explaining why it had been rejected. The notice shall contain information about how to apply for a reconsideration.

20. Rule 12(1)(c) states that the staff of the Tribunal office shall refer a claim to an employment judge if they consider that the Claim may be one which institutes relevant proceedings and is made on a claim form that does not contain an early conciliation number or confirmation that one of the EC exemptions applies.

21. Rule 12 (2) states that the Claim shall be rejected if the Judge considers that the claim or part of it is of a kind as described, inter alia, at 12(1)(c).

22. Rule 12 (3) states that if the Claim is rejected the form shall be returned to the Claimant together with a notice of rejection giving the reason for the Judge's rejection. The notice shall contain information as to how to apply for a reconsideration of the rejection

23. Under Rule 13 a Claimant whose Claim has been rejected under Rule 10 or 12 may apply for a reconsideration on the basis that either the decision to reject was wrong or that the notified defect can be rectified. Rule 13(4) states that if the Judge considers that the original rejection was correct but that the defect has been rectified than the claim shall be treated as presented on the date it was rectified.

24. Applying those Rules to the facts of this case the following appears to be correct. The 1st Claim was validly presented on 14 May. The staff member that dealt with it noticed that there might be a problem with the EC number and referred it to an Employment Judge pursuant to Rule 12.

25. Once the EC Certificate was obtained and it was seen that there was a clear error on the EC number then either the staff member could have rejected the Claim under Rule 10 (1)(c)(i) or alternatively (and preferably) re-refer to a Judge for consideration of rejection under Rule 12 (1)(c).

26. Pausing there it was common ground at this hearing following from paragraph 22 of **STERLING -v-UNITED LEARNING TRUST (2015) UKEAT 0439/14** that:

"Once it is accepted that the tribunal was entitled to think that the form did have a couple of digits missing, the question is whether the tribunal was then obliged to reject the form. The wording of r 10 was not significantly in issue before me. Where the rule requires an early conciliation number to be set out, it is implicit that that number is an accurate number. The tribunal had found it was not. Once that appeared

to be the case, the tribunal was obliged to reject it, and that rejection would stand, subject only to reconsideration…"

27. It follows therefore that the answer to the enquiry set out at paragraph 10 above did not, in fact, actually contain the correct possible answer as to what to do next in that once it had been established that the EC number was incorrect the only option available to the Tribunal pursuant to the Rules was rejection under 12(2) and the return of the Form with a notice of rejection and information as to how the Claimant should apply for a reconsideration of that rejection. The Judge erred in allowing the Claim to be accepted as set out in paragraph 11 above.

28. The process that should have taken place after what should have been a rejection was that the Claimant would have applied for a reconsideration on the basis that the notified defect could be rectified. In fact, of course, as belt and braces, that is precisely what the Claimant actually did by submitting another form once they had been alerted to the problems with the first claim and it is reasonable to find that had the Claim been rejected then the defect would have been corrected with the submission on the day the 2nd claim was lodged (11 July).

29. The parties have appeared before me today and I am grateful for their respective submissions. The Rules between 8 and 13 expressly permit reconsideration of decisions to reject but there is no express power there to reconsider decisions to accept. Under Rule 70 a Tribunal may of its own initiative or on the application of a party reconsider any judgment where it is necessary in the interests of justice to do so and upon that reconsideration can confirm, vary or revoke the decision.

30. The Respondent made an application for a reconsideration on 28 September and has requested pursuant to Rule 71 that I reconsider the decision to accept the Claim. I note the time limits for bringing such an application but note that the Respondent was not fully copied into the correspondence from the Tribunal and consider that it would be just and equitable to hear the application for reconsideration.

31. I was not the Employment Judge who originally made the decision to accept but the matter has come before me today and it was not reasonably practicable for the original Judge to deal with this matter and additional costs would have been needed to be spent by the parties to achieve that as well as substantial delay. With the acceptance of the parties I asked the Regional Employment Judge, pursuant to Rule 72(3) to appoint me to deal with the reconsideration application and she did so BY AN Order made on 30 January 2019 and sent out to the parties on 6 February 2019.

32. Under Rule 1(3)(b)(ii) a judgment is defined as being a decision made at any stage of the proceedings (but not including a decision under Rule 13 or 19) which finally decides any issue which is capable of finally disposing of any claim or part of a claim even if it does not necessarily do so (for example an issue whether a claim should be struck out or a jurisdictional issue).

33. I find that the decision to accept the claim detailed at paragraph 11 does not come within Rule 13 as at the material time there had been no rejection or any reconsideration of a rejection and that the decision to accept the claim was one which was jurisdictional in nature. I am satisfied therefore that the decision is a Judgment that falls under the ambit of reconsideration under Rule 70 and that it would be in the interests of justice for consideration to be given to it.

34. On the one hand the error which caused all of this is on its face very minor, the mere transposition of two digits. Rhetorically one might ask how it can be in the interests of justice to possibly deny the Claimant a claim that she would be otherwise able to bring for such a minor error. The answer to that question is, of course, that the Rules specifically and mandatorily prescribe what needs to happen and it seems to me that although the default is minor in terms of what was done it is a major error in light of the Rules as there is no discretion that can be given. I refer back to the previous quote from Sterling.

35. The decision to accept the Claim was wrong and must therefore be varied so that the Claim is rejected and not accepted. The only claim that has been validly made therefore is the 2nd claim that was made on 11 July. Pausing there for a moment it is noteworthy that even though the Employment Judge should have rejected the claim rather than having accepted it the actual date from which the Claim was lodged / was deemed to be lodged on either his or my analysis leads us back to the same date for a claim to be lodged.

36. I am fortified in my belief that that is the correct decision by reflecting on what would have happened had there been a rejection under 12(3) on 3 July and I am quite satisfied that the Claimant would have also sent in the 2nd Claim on the same day in an application pursuant to Rule 13 and that the Judge looking at it would have decided that the original rejection was correct and that the Claim would have been deemed presented on 11 July.

37. It follows therefore that the Claims before me have been presented just under 2 months out of time. I have different tests to apply when considering whether time should be extended. Section 111 (2) (b) ERA allows a claim to be presented 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. The same test is applicable for the wrongful dismissal claim pursuant to Article 7 of the ET Extension of Jurisdiction Order 1994.

38. The claims under the Equality Act need to be brought within three months of the date of the act to which the complaint relates or such other period as the Tribunal considers just and equitable.

39. The when in this case is known as is the why. The Claimant's solicitors made an error when drafting the claim and submitting it on the Claimant's behalf. There have been a number of judicial attempts to establish a clear and useful definition of the phrase "reasonably practicable" but each case turns on its own circumstances and such attempts have not been that successful. In **PALMER V SOUTHEND ON SEA BOROUGH COUNCIL (1984) ICR 372** the

Court of Appeal determined that it did not mean either “reasonable” or “physically possible” and alighted on “reasonably feasible” which does not really take things forward from the wording of the statute. Lady Smith asserted in **ASDA STORES LIMITED V KAUSER (EAT 0165/07)** that there was a need **“to ask whether, on the facts found, it was reasonable to expect that which was possible to have been done”.** That appears to me to be easily understood and workable guidance when considering reasonable practicability.

40. In this case the facts are quite clear. The Claimant instructed solicitors to lodge her claim for her. They did so but failed to set down the EC number correctly which is, under the Rules, catastrophic. When the issue was brought to their attention, they acted promptly to remedy the issue. Most of the period of just under 2 months was on account of the Tribunal not processing the claims as expeditiously as one might wish, as would set out in paragraph 5 and 8 above.

41. If a Claimant engages solicitors to act for her in presenting a claim it will normally be presumed that it was reasonably practicable to present a claim in time. Indeed, but for the error in the EC number this claim would have been lodged in time. There is no suggestion in this case that the Claimant is at fault at all. The Dedman principle has been with the Tribunal system for 45 years and in that case (**Dedman v BBEA Limited (1974) ICR 53**) Lord Denning pithily stated, **“If a man engages skilled advisors to act for him and they mistake the time limit and present the claim too late- he is out”.** There have been a number of examinations of the principle over the years, but it has remained intact and remains a question of fact for the Tribunal to consider in light of the full situation. At paragraph 38 of Zhou examples are given as to circumstances which might mitigate the Dedman principle, but those examples do not apply here nor am I able to think of anything within this case that might mitigate that principle.

42. There have been recent considerations of cases very similar in their facts to this and in particular **ADAMS V BT LIMITED (2016) EAT 0342 /15** and **NORTH EAST LONDON NHS FOUNDATION TRUST V ZHOU (2018) EAT 0066/18**. In the latter case HHJ Eady reviews the Adams authority in quite some detail.

43. Following a recitation of the facts it was held by HHJ Eady that “***The Claimant had believed she had lodged a properly constituted claim in time because she had confidence in her professional advisers. If those advisers had unreasonably failed to lodge a properly constituted claim in time, however, then the application of the Dedman principle (see Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379 CA) would mean that the Claimant would not be entitled to simply rely on her confidence in what they had done; she would be bound by their unreasonable conduct. The question then became whether the Claimant’s solicitors had acted reasonably”.***

44. There was a slight difference in fact in the Zhou claim because the Claimant had herself filled out the Claim Form which was checked and submitted by her

solicitors. In this case the Claimant had no part in the drafting at all and left it all (not unreasonably) to her solicitors.

45. In this case the start point as it seems to me is that the Claimant is bound by the acts of her solicitors and the Dedman principle applies. The solicitors were clearly at fault and the Zhou claim requires me to consider whether or not they had acted unreasonably.

46. Although I have every sympathy for the Claimant, I have no hesitation in finding that they did act unreasonably and because of their unreasonable conduct failed to lodge a Claim within the required time limit. The Claimant's solicitors, as skilled advisors, must have known the importance of ensuring that the correct EC number was included on the form (not least because of the cases above and the inflexibility of the Rules relating to EC numbers) but notwithstanding that the Claim was permitted to be submitted, 2 days before the limitation period ended, with an incorrect EC number. It is precisely the care and consideration that is being paid for and which one can reasonably expect to be got right. By drafting an incorrect number on the form and then failing to spot the error before submission I consider that the solicitor's conduct was unreasonable. This was a wholly preventable circumstance and to go back to Lady Smith's observation above it was clearly possible for a correct claim to be lodged in time and it was reasonable to expect what was possible to be done. I can see no other matters that materially affect the test of reasonable practicability and the Claims for unfair and wrongful dismissal must be dismissed as the test for extending time cannot be met on the facts of this case.

47. Under the Equality Act 2010 employment tribunals have a wide discretion to allow an extension of time. It is for the Claimant to demonstrate that it is just and equitable to extend time and in the case of **Robertson v Bexley Community Centre (2003) IRLR 434** the Court of Appeal expressed the view that exercise of the discretion should be the exception not the rule.

48. In determining whether to permit a late submission of a discrimination claim the EAT in ***British Coal Corporation v Keeble (1997) IRLR 336*** suggested that Tribunals would be assisted by considering the factors in section 33 of the Limitation Act 1980. That section deals with the discretion in civil courts in personal injury cases and requires the court to consider the prejudice each would experience by any decision to extend and to have regard to the length of and reasons for the delay and the extent to which evidence was likely to be affected and the promptness of action once a claim became a possibility. Considering such matters should act as a guide and anything relevant can be taken into account.

49. I had no hesitation in rejecting the unfair dismissal claim when considering the statutory test to be applied and I have no hesitation in exercising my discretion in favour of the Claimant so far as the discrimination claims are concerned.

50. The circumstances that have led to the Claim being submitted late are not the fault of the Claimant at all but her advisors. There will be minimal delay in

getting this matter to a final hearing on account of the default and having it determined. Although almost two months late most of that was due to processing difficulties at the Tribunal and the matter would inevitable have been listed for a PH to determine the discrimination issues which have been heard on the same date as this PH was. Even if I am wrong on that, the extension of time scales caused by the default would not in my view affect the cogency of the evidence or the possibility of a fair trial.

51. I am satisfied that the respondent has not been prejudiced in their defence to this claim and that for this claim to be dismissed on such a technicality would be wholly contrary to what is right and fair and out of all proportion to the error perpetrated by the Claimant's solicitors. I view the unfair dismissal in the same way, but I do not consider that a proper application of the reasonably practicable test allows me the flexibility the just and equitable formulation has. There will be prejudice to the Respondent in that they will have to fight a claim which could be time barred but that is the same for every claim which has the same or similar problems to this. It does not come close to balancing the prejudice that the Claimant would face if the claim were not permitted to proceed. I am further satisfied that prompt action was taken to address the issues once the error had been notified.

52. For the reasons given above I dismiss the unfair and wrongful dismissal claim but permit the discrimination claim to proceed.

Employment Judge Self

18/03/2019