EMPLOYMENT TRIBUNALS

Claimant: Mr J Olumodeji

Respondent: Abellio London Ltd

Heard at: Croydon **On:** 13 February 2019

Before: Employment Judge Nash (sitting alone)

Representation
Claimant: Mr Curtin, retired solicitor
Respondent: Ms Smith, solicitor

RESERVED JUDGMENT

1. The Tribunal does not have jurisdiction to consider the complaint of unfair dismissal because it was presented outside the statutory time limit when it was reasonably practicable to do so.

REASONS

The hearing

1. At this hearing, the Tribunal revoked the judgment of 9 January 2018 striking out the complaint. It proceeded to take the decision again.

2. The Tribunal heard evidence from the claimant only. He had prepared a witness statement. In addition he relied on his ET1 to which he swore.

3. The Tribunal had sight of a bundle provided by the Respondent. The claimant relied on no other documents.

The claims

4. The only complaint was of unfair dismissal under section 98 Employment Rights Act 1996.

5. The issue was whether the Tribunal had jurisdiction to consider the complaint because it was presented outside of the statutory time limit. It was accepted that the claim was presented out of time and the claimant asked the tribunal to exercise its discretion to extend time.

6. The claimant relied on two grounds on which time should be extended:

    a. That he had been prevented by the fee regime in force at the material time from presenting his claim and that this was a so-called "lost claim" which should be heard following the Supreme Court judgment in *ex parte Unison [2017] UKSC 51* (the Unison judgment); and further and in the alternative

    b. The grounds contained in his ET1 going to his personal circumstances (the personal grounds).

The facts

7. The facts as to the time point were not in dispute as they were a matter of record.

8. The effective date of termination was 19 April 2017. The ACAS early conciliation period ran from 25 to 28 July 2017 inclusive. The claim was presented online on 29 August 2017.

9. It was not in dispute that the claimant had not started the ACAS early conciliation process within the statutory time limit, which expired on 18 July 2017. Further, it was not in dispute that the claimant had not presented his application to the Tribunal within one month of the end of the early conciliation period being 28 August 2017.

The applicable law

10. The applicable law is found in the Employment Rights Act 1996 as follows:

s.111 Complaints to employment tribunal

(1)A complaint may be presented to an employment tribunal against an employer by any person that he was unfairly dismissed by the employer.

(2)Subject to the following provisions of this section, an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(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.

(2A)Section 207A(3) (extension because of mediation in certain European cross-border disputes) and section 207B (extension of time limits to facilitate

conciliation before institution of proceedings) apply for the purposes of subsection (2)(a).

s 207B Extension of time limits to facilitate conciliation before institution of proceedings

(1)This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a "relevant provision").

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

(2)In this section—

(a)Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and

(b)Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

(3)In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.

(4)If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.

(5)Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

Submissions

11. Both parties made brief oral submissions.

12. The claimant submitted that this was a so-called "lost claim" in that the reason for the lateness of the claim was the fees regime and the reason for its subsequent submission was the removal of the fees by the Unison judgment. In the alternative, the tribunal should extend time under the personal grounds.

13. The respondent submitted that this was not a "lost claim" under the fees regime and the Unison judgment. The Unison judgment had nothing to do with the delay in presenting the claim and the only grounds for extension were the personal grounds, which did not render it not reasonably practicable to present the claim in time.

Applying the Law to the Facts

14. The Tribunal firstly considered if this was, as contended by the claimant, a "lost claim" pursuant to the Unison judgment, that is, was the claimant prevented from complying with the time limit by the fees regime in force at the date the time limit expired. Was this the reason that the claimant had not presented his claim timeously and, if so, was the Unison judgment the reason that he later presented his claim. This was firstly a question of fact – what, if any, impact did the fees regime have upon the claimant's delay?

15. The Tribunal considered the claimant's witness statement, which was the first occasion when the claimant relied on the Unison judgment. However, the tribunal was unable to attach weight to this statement as it concluded the statement was not written by the claimant and did not reflect his state of mind. The statement made a number of references to employment law and, under questioning from the tribunal, it was clear that the claimant – perfectly understandably - did not know what it meant. Further, his oral evidence before the Tribunal contradicted his witness statement in material respects as to the facts.

16. According to the claimant's statement, because he had limited means following his dismissal, he had not wanted to "commit funds" to a Tribunal claim. However, "with the advent of case regarding the abolition of fees…I was encouraged to proceed..." He submitted his case to ACAS Early Conciliation, "to get the ball rolling" on 25 July 2017 (the day before the Supreme Court gave the Unison judgment) because he had heard that the case was likely to succeed. He stated that he did not qualify for fee remission.

17. The claimant's evidence before the Tribunal was, however, materially inconsistent with the facts as set out in his witness statement. He was entirely confused about what had happened on what date, for instance he was unable when answering questions to differentiate between the application to ACAS and the presentation of the ET1, even when taken to the relevant documents.

18. When asked why he had decided on 25 July 2017 to start the Tribunal process (whether by contacting ACAS or the Tribunal) he could not say why he had done this. He did not refer to the Unison case or the fees regime, in straightforward contradiction of his witness statement. He could not remember if ACAS had told him that he was out of time when he contacted them. He could not remember if he spoke to ACAS about the fees.

19. He told the Tribunal that he could not remember why he had decided to start the Tribunal process on 25 July 2017 and then referred to friends and family pressurizing him over a long period to start a claim. He said that he was depressed and was preoccupied with a criminal case against him in the Magistrates Court. This arose out of the incident over which he was dismissed and he was acquitted on 13 July 2017.

20. The claimant, contrary to what was said in his statement, told the Tribunal that he had not made enquiries as to the fees or the remission scheme and did not know how much the fees cost or if he might qualify for remission.

21. The claimant told the Tribunal that he probably would have paid the fee in the end in order to bring a claim.

22. The material events took place in July and August 2017, well over a year before the hearing, and that the claimant's confusion was understandable in the opinion of the Tribunal. The Tribunal accepted that he was not familiar with the Employment Tribunal and genuinely found the process confusing.

23. There was no reference to the fees regime or the Unison judgment in the ET1, which the claimant had drafted himself and presented on 29 August 2017, when his recollection of events would be expected to be more reliable, than in February 2019 at the Tribunal hearing.

24. Taking the evidence in the round, the Tribunal found that the fee regime and its removal were not the main reason for the claimant's failure to comply with the statutory time limit by starting the ACAS early conciliation procedure by 18 July 2017. The claimant contacted ACAS the day before the day of the Unison judgment, rather than afterwards, as would be expected if he were influenced by it. In his ET1 and before the Tribunal the Claimant did not say that it was the fees regime that prevented him from starting the Tribunal process. He gave a number of other reasons.

25. It is possible that the fee regime may have been a factor in the claimant's failure to start the Tribunal process within the time limit. However, the Tribunal found that even if the fee regime had not been in place at the material time, he would not have started the ACAS early conciliation procedure any earlier. He had made no enquiries as to the amount of the fee or whether he might qualify for remission. The fees regime was not a material factor in his delay. He told the Tribunal that he would probably have paid a fee if the fees had not been abolished.

26. The Tribunal found that there were a number of other more significant reasons why the claimant did not comply with the statutory time limit. He had a Magistrates Court appearance on 13 July on an allegation of violent crime. The Tribunal accepted his evidence that this was a very significant distraction. In addition, whilst the Tribunal saw no medical evidence, it accepted that the claimant was finding it difficult to manage matters having lost his job and having significant family responsibilities.

27. The Tribunal found that, on the facts, this was not a so-called "lost case" resulting from the unlawful fees regime in place at the material time. The reasons that the claim was started out of time were those reasons set out in the Claimant's ET1, with which his evidence before the Tribunal was consistent.

28. The Tribunal accordingly went on to consider the personal reasons for the failure to comply with the statutory time limit and whether these rendered it not reasonably practicable to comply.

29. The Claimant stated that he had a brother with muscular dystrophy whose condition seemed to have worsened and who requires considerable time and monitoring. Further, the claimant had caring responsibilities for his elderly mother. Finally, together with the criminal hearing on 13 July, it, "all seemed a bit too much to bear, I lost sight of time. I am deeply sorry."

30. Whether it is reasonably practicable for a claimant to comply with the time limit is a question of fact. The burden of showing that compliance is not reasonably practicable is on the claimant. According to the Court of Appeal in Palmer and anor v Southend-on-Sea Borough Council 1984 ICR 372, CA, 'reasonably practicable' does not mean reasonable, and does not mean physically possible, but means something like 'reasonably feasible'. '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'.

31. There was no suggestion that the claimant was ignorant of his rights or of the time limit. Before the Tribunal the claimant explained that he knew of the time limit and the fees regime and he knew of his right to bring a claim. A former colleague who was a union rep advised him of this. He stated in terms in his ET1 that the claim was out of time.

32. Before the Tribunal the Claimant made reference to being "depressed", but he provided no medical evidence going to this. He provided no details or evidence of his caring responsibilities for his brother and mother. The burden is on him to show that it was not reasonably practicable to comply. Further, he was, on his case, able to attend the Magistrates Court hearing on 13 July and was acquitted. He did not suggest that he had been unable to attend to any other significant matters in the months after his termination.

33. As the respondent pointed out, the claim was out of time not only because the Claimant did not start the ACAS procedure timeously. He also did not present the claim to the Tribunal within one month of the end of the Conciliation Period. He was one day late – presenting on 29 August 2017 when the Period ended on 28 July 2017. The reason given before the Tribunal was that he had not been checking his emails and so did not realize that ACAS has sent the Conciliation Certificate.

34. The Tribunal found that the reason the Claimant failed to comply with the time limit was, as he frankly admitted in his ET1, that he "lost sight of time" as it "all seemed a bit too much to bear". However, the Tribunal cannot find that it was not reasonably practicable to both contact ACAS within the statutory time limit and also present the claim to the Tribunal within one month of the end of the Conciliation Period. The second was a simple oversight on the Claimant's part. It

    cannot be said that he could not have kept an eye on his email, especially when he accepted that he knew that time was of the essence.

35. As the Tribunal has found that it was reasonably practicable to comply with the statutory time limit, it has no jurisdiction to consider the complaint of unfair dismissal.

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Employment Judge Nash
26 February 2019

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