EMPLOYMENT TRIBUNALS (SCOTLAND)

Case Number: 4120172/2018

Preliminary Hearing held in Glasgow on 7th January 2019

Employment Judge M Whitcombe

Mrs ML MacInnes	**Claimant** **Represented by:** **Mr L Kennedy** **(Advocate)**
The British Red Cross Society	**Respondent** **Represented by:** **Mr R Bradley** **(Advocate)**

JUDGMENT

The judgment of the Tribunal is that the claim for unfair dismissal was presented outside the period specified in section 111 of the Employment Rights Act 1996. It was reasonably practicable to have presented it within time. Consequently, the Tribunal has no jurisdiction to hear the claim and it must be dismissed.

REASONS

Introduction

1. This preliminary hearing has been arranged to determine as a preliminary issue whether the claim was presented outside the relevant statutory time limit such that the Tribunal has no jurisdiction to hear it. At the end of the

hearing I reserved judgment, which I now give with written reasons.

2. The respondent dismissed the claimant from her job as the manager of its Lochgilphead shop for alleged gross misconduct. The claimant alleges that her dismissal was unfair. The effective date of termination is disputed. The date was either 26th or 30th April 2018, but it was agreed that it makes no difference for present purposes and that it is unnecessary for me to resolve that dispute.

3. A previous preliminary hearing for the same purpose before EJ Gall on 11th December 2018 was ultimately postponed with an order for expenses in the respondent's favour, essentially because the claimant's representative required a postponement in order to be able to call necessary witness evidence. Full details are contained in EJ Gall's written judgment and reasons sent to the parties on 20th December 2018.

Evidence

4. I heard from just one witness – the claimant's solicitor Mr Smith Watson. He gave evidence on oath and was cross-examined. I have no issue with his honesty or credibility. I would however observe that in some important respects his evidence was (and was conceded to be) hearsay. He gave hearsay evidence of telephone conversations between an unknown member of the Employment Tribunal administration in Glasgow and Billy Ross, whose role is described below.

5. Although admissible, hearsay evidence on what proved to be both a central and a contentious issue carried greatly diminished weight given that it would have been entirely possible to call Billy Ross to give evidence at this hearing himself. The failure to do so was not explained. Further, the hearsay evidence in question was not supported by any contemporaneous documents.

6. I was also supplied with documents contained in a number of separate packs. There was a "note of authorities and other materials for the respondent" and

three separate thin "inventories of productions" for the claimant running to just a few pages each.

Findings of Fact

7. The claimant bears the burden of proving on the balance of probabilities all of the facts necessary to establish the tribunal's jurisdiction to hear her claim. Having heard the evidence and the parties' submissions I make the following relevant findings of fact on the balance of probabilities. They can be fairly briefly stated.

8. First of all, some background facts concerning the solicitors acting for the claimant. At all relevant times the claimant was and is represented by Rubens solicitors, a rural practice with a single office in Lochgilphead. Mr Smith Watson is an extremely experienced solicitor admitted in 1978. Employment law is one of the fields in which he conducts litigation. Mr Smith Watson works as a consultant with Rubens. He attends the office for just one day each week. The precise day varies. The rest of the time he services clients from his home in Glasgow. At the relevant time the only other qualified solicitor at Rubens was the principal, but he was mostly involved in criminal work and was almost always in court rather than in the office. The principal only "dabbled" in civil work (Mr Smith Watson's phrase) and was not involved in the claimant's case.

9. There were only two other members of staff at Rubens, and neither was a qualified solicitor. When Mr Smith Watson was out of the office his assistant Billy Ross handled the file under Mr Smith Watson's remote supervision. Mr Smith Watson explained that although called an "assistant" Billy Ross was effectively a secretary.

10. The claimant's dismissal took place either on 26th April 2018 or 30th April 2018. ACAS received notification of early conciliation on 29th June 2018, within the 3 month primary limitation period, and time was accordingly extended for that reason.

11. On 12th August 2018 an early conciliation certificate was issued.

12. The claimant attempted to present a claim form (ET1) to the tribunal on 7th September 2018. It was sent by her solicitors both by email attachment and also by post. The former method of service is not one of those permitted by the mandatory terms of the Presidential Practice Direction and rule 8(1) of the ET Rules of Procedure 2013. Presumably, the ET administration processed the version received by post. Exceptionally, the Practice Direction allowed submission by email attachment only during the period 26th July 2017 until 31st July 2017, but "not otherwise".

13. The claim form was rejected because the whole of the EC Certificate number had not been included on the form. The final characters "…/12" had been omitted. The decision to reject the claim because of the defective EC Certificate number has not been challenged by an application for reconsideration or an appeal to the EAT.

14. Mr Smith Watson was responsible for the accuracy of the form and he accepts that he should have realised that a full EC certificate number had not been included on the ET1. He said "the error was entirely mine". I also accept his evidence that he was not aware of the mistake until it was pointed out by tribunal staff (see below).

15. It is common ground that the last day on which a claim form could have been presented within the time limit was 12th September 2018. I also find that the claimant's solicitors were either consciously aware of that fact, or else that they ought reasonably to have been. The relevant date was easily established.

16. On 12th September 2018 an unknown member of the Employment Tribunal administration in Glasgow called the offices of the claimant's solicitors and spoke to Billy Ross. The claimant's solicitors were informed that the claim form would be rejected. Consequently, Billy Ross telephoned Mr Smith Watson the same day. In his evidence Mr Smith Watson said that his own

conversation with Billy Ross took place earlier than 11:15. Mr Smith Watson instructed Billy Ross to obtain the correct early conciliation number, to ensure that it was contained in the claim form, and to submit the corrected claim form "electronically" and to do that "today" (i.e. 12th September 2018).

17. Mr Smith Watson has more recently been told by Billy Ross that the member of the Tribunal administration with whom he spoke said that "electronic submission" of a new, corrected claim form would not possible, since the form could only be submitted electronically once. I do not accept that hearsay evidence as being accurate on the balance of probabilities. Firstly, it is simply incorrect to say that a claim form can only be submitted electronically once. If a claim form is rejected then a new form may be submitted by any of the prescribed means. One of them is online submission. Secondly, the claim form had not been submitted online the first time around, it had been attached to an email. They are quite different things, and there is no question of having used up a single opportunity to submit online even if there were only one opportunity to do so. There was neither any need nor any proper basis for a member of ET staff to say what they are alleged to have said. Thirdly, the hearsay evidence on this important point is not supported by a contemporaneous note of the conversation between Billy Ross and the member of ET staff. That undermines its weight. For all of those reasons, I find that the member of ET staff did *not* say that online submission would be unacceptable.

18. What is much more likely, and what I find on the balance of probabilities to have happened, is that the member of ET staff told Billy Ross quite correctly that submission *by way of email attachment* would not be acceptable. That is an accurate reflection of the mandatory requirements of the Practice Direction. It is easy to understand why a member of ET staff might have said that, since the original claim form had been submitted by way of (impermissible) email attachment as well as (permissible) post.

19. Billy Ross sent a hard copy of the ET1 to the Employment Tribunal offices in Glasgow on 12th September 2018 by DX. By doing so he failed to follow Mr

Smith Watson's instruction. Since the DX is not a same day courier service, the only certainty was that the claim form would arrive after the expiry of the time limit. It is unclear whether or not Billy Ross appreciated that when he decided to use the DX, but I find that it would have been obvious to a competent and reasonable solicitor, or to other employees of a competent and reasonable firm of solicitors working under competent and effective supervision.

20. Despite the logistical difficulties faced by a firm of solicitors operating from a fairly remote part of Scotland, I find that the claim form could have been submitted almost immediately following the conversation with Tribunal staff on 12th September 2018 by any of the following means:

    a. by online submission, as Mr Smith Watson had instructed;
    b. by using a courier to effect hand delivery;
    c. by using local agents, who could have been sent a copy of the ET1 by email for printing and hand delivery to the ET offices.

21. Any of those methods would have been a straightforward, speedy and effective solution to the problem faced by the claimant's solicitors on 12th September 2018. They would each have complied with the Practice Direction resulting in valid submission of the claim form the same day, and therefore within the limitation period. There was sufficient time to have adopted any of those methods, since it is clear that Billy Ross sent an email to the ET at 11:15 on 12th September 2018 attempting to correct the date on the original form by email. While it is now common ground that this was inadequate, and that a new corrected form required to be submitted, the timing of that email shows just how much time there was left on 12th September 2018 to use one of the valid and speedy methods of submission set out in the preceding paragraph.

22. A hard copy ET1 containing the full and correct EC certificate number arrived at the Tribunal premises in the DX delivery on 14th September 2018. It was accepted with effect from that date. A standard tribunal letter noting that the

claim appeared to have been presented outside the relevant time limit was sent to the claimant's solicitors on 14th September 2018.

Legal Principles

23. The time limit for bringing an unfair dismissal claim derives from section 111(2) of the Employment Rights Act 1996. An employment tribunal shall not consider a complaint under section 111 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.

24. Those rules are modified by subsection (2A) in cases where time limits are extended to facilitate conciliation before the institution of proceedings under section 207B of the Employment Rights Act 1996. It is not necessary to delve too deeply into the detail of those rules for the purposes of these reasons since it was agreed between the parties that the effect of early conciliation in this case was to make 12th September 2018 the last day on which a complaint could be presented within time, as is recorded above in my findings of fact.

25. The essential question is therefore one of "reasonable practicability", which is a practical test addressing the "reasonable feasibility" of submitting a claim form within the time limit.

26. It is for the claimant to demonstrate that the presentation of the complaint within time was not reasonably practicable (***Porter v Bandridge Ltd*** [1978] ICR 943, CA at 948D-E).

27. If the claimant satisfies the tribunal that it was not reasonably practicable to present the complaint within time, the next question is whether the complaint was presented within a reasonable further period. In this case Mr Bradley helpfully and realistically conceded that *if* the claimant demonstrated that it

had not been reasonably practicable to bring the complaint within time then he would accept that the complaint had been presented within a reasonable further period. It followed that the sole question for me was that of reasonable practicability.

28. The reasonable practicability test is very different from that found in discrimination claims and is generally felt to be stricter in most situations than a test based on the "justice and equity" of extending time or of hearing a complaint late (see for example the terms of section 123 of the Equality Act 2010). I emphasise the difference because at certain points in his submissions Mr Kennedy referred to "justice and equity" and to the "balance of prejudice". Those concepts belong to the time limits applicable to discrimination claims, and the factors listed in ***British Coal Corporation v Keeble*** [1997] IRLR 337, EAT. Further confirmation of that is if necessary provided by paragraph 42 of ***Zhou*** (see below).

29. In his written submissions Mr Kennedy also invited me to interpret section 111 of the Employment Rights Act 1996 in accordance with the overriding objective in rule 2 of the ET Rules of Procedure 2013. He argued that the interests of justice required that the claim should proceed. I reject that submission as a matter of legal principle, because even if the overriding objective weighed in favour of any particular outcome on the question of time limits (and both sides might argue that it supported their position), the simple fact is that it cannot be used as a tool for the interpretation of primary legislation. The application of the overriding objective is expressly limited to the interpretation of the ET Rules of Procedure themselves and the application of those Rules. The overriding objective does not modify the applicable statutory test of reasonable practicability, which defines the jurisdiction of the Tribunal and is not merely a procedural rule.

30. I derive the following legal principles from the case law cited to me. It is not necessary to dwell on those dealing with rejection under rules 10 or 12 since there is no challenge to the rejection of the original claim form. The key authorities include ***Adams v British Telecommunications plc*** [2017] ICR

382, Simler P, ***North East London NHS Foundation Trust v Zhou*** (UKEAT/0066/18/LA), HHJ Eady QC, ***Software Box v Gannon*** [2016] ICR 148, ***Baisley v South Lanarkshire Council*** [2017] ICR 365, EAT and ***Dedman v British Building and Engineering Appliances Ltd*** [1973] IRLR 379, CA.

31. The focus is properly on the practicability of submitting the "second" claim form within time. That is not necessarily established simply because the first claim form was presented within time but correctly rejected. It may be that the claimant and/or their solicitor mistakenly believed that a properly constituted claim had been presented in time.

32. Where a claimant or their advisers were *at fault* in allowing the time limit to pass without presenting a claim it could not be said to have been impracticable for the complaint to have been presented in time ("the ***Dedman*** principle"). However, the strict application of that principle is modified slightly the test in the following paragraph.

33. Where there was a genuine and reasonable mistaken belief that a claim had been validly lodged in time that might mean that it was not reasonably practicable to lodge a second correctly constituted claim within the primary time limit. The reasonableness of the mistake is an important consideration because the "***Dedman*** principle" means that a claimant cannot rely on an error made by their adviser unless the error was itself reasonable (see ***Marks and Spencer plc v Williams-Ryan*** [2005] ICR 1293, CA). Where solicitors are at fault, that does not necessarily mean that their conduct is properly regarded as "unreasonable" for that purpose.

Reasoning and conclusion

34. Applying those legal principles to the facts as I have found them, my reasoning is as follows.

35. While the claimant's solicitors might well have had a reasonable

misapprehension that a valid claim form had been submitted on 7th September 2018, that misapprehension could not and did not last any longer than the moment during the morning of 12th September 2018, at a time which must have been earlier than 11:15, when a member of Tribunal staff informed Billy Ross that the claim form submitted on 7th September 2018 would be rejected for lack of a valid early conciliation certificate number. There could not be a *reasonable* misapprehension after that time on 12th September 2018 given the information conveyed by the member of Tribunal staff. Further, I find that there was no misapprehension at all after that conversation since the claimant's solicitors accepted what they were told by the member of Tribunal staff.

36. I find that it was still reasonably practicable to submit the claim within time at that point. It could have been done electronically (in the sense defined by the Practice Direction, in other words *online* rather than by email attachment), as Mr Smith Watson had instructed. Couriers or local agents could also have been used. Those were all reasonably practicable means of lodging the claim within time.

37. The position can be distinguished from that in ***Adams*** in which the claimant or their solicitor only discovered that the claim had been rejected *after* the expiry of the limitation period. In that situation the reasonable misapprehension continued beyond the moment at which time expired. The present case is different: the claimant's solicitor learned of the rejection while there was still time to correct the deficiency and to submit a valid claim form within time.

38. To the extent that a mistake on the part of the claimant's solicitors is relevant, it is in their choice of method of submission of the corrected claim form once they were informed that the first attempt would be rejected. They chose to use the DX, a method which would inevitably have resulted in at least one more day of delay and therefore in the presentation of the claim form out of time. They did so despite the availability of other methods which would have ensured presentation of the claim form within time. I find that mistake to have

been unreasonable in all the circumstances, and I do not accept the submission that my finding amounts to requiring a standard of perfection. The claimant's solicitors unreasonably failed to choose options which would have resulted in submission of the claim form within time. I have already set out why I do not accept that a member of the Tribunal administration told Billy Ross that online submission would not be acceptable. Even if I had accepted that hearsay evidence, there remained other ways of presenting the complaint within time, including the use of a courier or local agents and it would have been reasonable to have used one of those methods.

39. I have been careful to avoid using the language of negligence, since that is not for me to decide. I am solely concerned with the question of reasonable practicability and a related issue of reasonable mistake. No doubt the claimant's solicitors will advise her on the implications of my findings.

40. In conclusion, my decision is therefore that it would have been reasonably practicable to submit the second, corrected, claim form within time. The claimant did not do so. It is irrelevant that the claim form was submitted within a reasonable further period since that limb of the test does not arise for consideration given my finding on reasonable practicability.

41. In those circumstances the Tribunal has no jurisdiction to hear the claim and it must be dismissed for that reason.

Employment Judge: M Whitcombe
Date of Judgment: 11 January 2019
Entered in register: 15 January 2019
and copied to parties