



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr K Hird

**Respondent:** Brakes Brothers Limited

**Heard at:** Nottingham

**On:** Thursday 18 April 2019

**Before:** Employment Judge P Britton (sitting alone)

## **Representation**

**Claimant:** In Person

**Respondent:** Mr T Doyle, Solicitor

**JUDGMENT** having been sent to the parties on 4 May 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## JUDGMENT

The claim, namely for unfair dismissal, is dismissed as being out of time, the Claimant having failed to show that it was not reasonably practicable to have brought it within the time limit or within a reasonable time thereafter.

## REASONS

### **Introduction and the law engaged**

1. Another Judge directed that there would be this Preliminary Hearing today in order to determine whether the tribunal has jurisdiction to hear the claim which is one of unfair dismissal it having been presented out of time. I have not dealt with the merits of this case as it is not part of my function today.

2. The following is the history of the case. On 28 June 2018 the claim (ET1) was presented by the Claimant to the Tribunal. It is a claim for unfair dismissal. It was somewhat scant on detail other than the facts as to why it was said the dismissal was unfair. What could be gleaned is that the incident at the heart of the decision to dismiss the Claimant was 15 February 2017. The claim did not set out as to how long the Claimant had been employed by the Respondent. When presented the Claim did not come with the all-important ACAS early conciliation certificate (ACAS ECC) which is needed to show that the Claimant has complied with ACAS early conciliation before presenting his claim..

3. Accordingly the claim was placed before an employment Judge who directed that it should not be served or accepted until the Claimant provided dates of his employment and a physical copy of the ACAS ECC. The Claimant was notified to that effect in writing on 13 July 2018 and required to reply by the twentieth. This the Claimant duly did, supplying the ACAS ECC and confirming that he was employed by the Respondent between 4 January 2014 and 22 February 2017. Accordingly an employment Judge directed that the claim be accepted albeit he *“this is potentially an R v Unison fees case” (although still considerably out of time)... time limit points will have to be considered later*”. The claim was accordingly duly accepted and served upon the Respondent which presented its detailed response (ET3) on 9 August 2018. Inter alia it made application that the claim be struck out as being out of time. By now the case has already been listed for a one day hearing at Lincoln on 3 January but not on the agenda at that stage was this fundamental jurisdiction issue. At the sift, that is to say a Judge considering the overall case having received the response and what directions to make, spotted the jurisdiction point was not on the agenda and so directed that there would now be a Preliminary Hearing, instead of one on the merits:

*“To consider the time point and specifically whether the claim should be struck out on the basis that the Employment Tribunal lacks jurisdiction to hear it.”*

4. It remained listed at Lincoln for 3 January. It was then postponed for lack of Judge time and relisted for today at Nottingham, the notice going out to the parties on 26 January 2019, making it abundantly clear and in bold that the only issue the Tribunal would be dealing with was the jurisdictional point.

5. I do not criticise Mr Hird, but the statement that he put into the Tribunal for today did not address at all the jurisdiction point dealing only with the merits of why his dismissal was said to be unfair. In similar vein the bundle before me prepared by the Respondent essentially concentrates on the same points but on the other hand it does give the time lines, although to me they are self-evident anyway.

6. So, what I have done is to hear the Claimant under oath in looking for an explanation as to why the claim was presented out of time and I will deal with that. Before I do I come to the jurisdictional point. It is at Section 111 of the Employment Rights Act, this being an unfair dismissal claim. Thus:

*“(2) Subject to the following provisions of this section<sup>1</sup> 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 3 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 the period of 3 months.”*

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<sup>1</sup> Not engaged.

7. I then need to factor in the provision at s207B which provides for extension of time to accommodate the ACAS early conciliation procedure and to which I shall briefly touch upon.

8. As to determining whether or not it was reasonably practicable for the claim to be presented before it was, the test is encapsulated in the definitive authority of **Palmer and Another v Southend on Sea Borough Council** [1984] ICR 372CA. First of all the time limit of course has to be construed strictly. Second, as to whether or not it was not reasonably practicable is a question of whether or not it was “not reasonably feasible” and the usual criteria for assessment would include such things as ignorance of rights and whether there was some physical or mental impediment that might have stood in the way of the Claimant bringing his claim within the time limit.

9. The following are unassailable facts in this case. Thus:-

9.1 The Claimant was most definitely dismissed on 25 February 2017 for gross misconduct. I repeat I am not dealing with the merits of that decision today. He was offered the right of an appeal which he took up and he had his appeal hearing on 29 March 2017 whereby the appeal was dismissed. The contract of employment which is before me in the bundle does not extend the period of employment post the initial decision to dismiss.

9.2 Thus in terms of the 3 month time limit as the effective date of termination was 25 February 2017, it would have run out on 24 May 2017.

9.3 That brings in the ACAS early conciliation point. Suffice it to say that the period of ACAS early conciliation certified by the ACAS ECC extends time, but in summary as the certificate was for between 27 April (day A) and 27 May 2017 (Day B) what it meant was that the Claimant's time for filing this claim was extended only to 26 June 2017. Thus it obviously means that when he presented his claim to the Tribunal on 28 June 2018 it was over one year out of time.

9.4 So the Claimant has got to prove to me, with the burden of proof being upon him, that on the balance of possibilities it was not reasonably practicable for him to have brought his claim before he did.

## **Findings of fact**

10. Having heard the evidence and considered the relevant documents, my findings are as follows.

10.1 The Claimant being unhappy, perhaps understandably so, with his dismissal went to a firm of solicitors known as Burton and Co. He made contact with them on 28 March 2017. He was thereafter seen; and it cannot have been later than 24 April 2017 upon which date he was sent the initial advice of the solicitor dealing with the matter: Ms Judith Brennan. I have read the advice and because the Claimant allowed me so to do. I will not rehearse any advice as to the merits and have indeed ignored the same, instead concentrating on what is revealed for the purposes of the decision which I have to make on the out of time issue.

10.2 She accurately set out the scenario in this case having had the documentation vis the disciplinary process and the appeal from the Claimant. She clearly saw him and discussed the case at length. Inter alia she set out what her anticipated fees would be if the Claimant wanted her firm to undertake the case. Crucially it was made absolutely clear as to the importance of the ACAS early conciliation procedure and inter alia it was stated "*we need to emphasise there is a clock on these proceedings which you will need to be aware of which runs 3 months until the last date of your employment, in this case 22 May 2017*". This was subject to ACAS early conciliation and indeed Ms Brennan started that process on behalf of the Claimant on 24 April 2017. That of course explains why that was the first date on the ACAS ECC. Ms Brennan ceased to act because put simply the Claimant tells me that he could not afford her fees. She therefore returned all the papers to him by letter dated 26 June 2017. The final point to make from the ACAS documentation which she attached and inter alia the ACAS conciliation flow chart was the fundamental point in bold on that document, setting out the time limit to which I have referred and its importance.

10.3 The Claimant has not put forward any mental impediment which prevented him from knowing all of that and I have no doubt that he did from what he tells me. He had felt dysfunctional for the first month or so after the employment ended but then he pulled himself together, and it is obvious that he by then had the necessary mental functionality to get in touch with Ms Brennan and provide her with detailed instructions etc. So what then happened? Piecing it together I am satisfied on the balance of probabilities that the Claimant at that stage did not bring a claim to Tribunal. He was vague on the point. He thought he might have done but then equally said that the claim that I have before me dated 28 June 2018 he thinks was probably the first one.

10.4 However he told me that when he thought about bringing a claim to Tribunal back circa April/May 2017, and then say at the end of the ACAS early conciliation certificate period, that he was put off by the then fees regime. However, this was challenged in terms of legality in a case led by Unison, the trade union. And on 26 July 2017 the Supreme Court held that the fees regime was a nullity. It was my recollection prior to what I am now going to say that the Ministry of Justice acted with immediate effect so as to cancel the fees regime but I double checked and indeed that is correct as the chief clerk has been able to remind me. What it then meant is that swiftly thereafter all Claimants who had brought claims to Tribunal but which had been rejected because they fell foul in one way or another of the fees regime, in due course received a letter from the Ministry of Justice informing them of the outcome of the Unison litigation and that they could in effect relitigate their cases.

10.5 Of course that left those folk who were deterred by the fees regime from bringing a claim in the first place. That brings into the equation whether or not this particular Claimant was unaware of the Unison judgment. But he has very honestly told me that he found out very soon thereafter and by "about the first week ("or so") of August 2017" he was in touch with an ACAS conciliation officer, Alan Gibson. According to the Claimant Mr Gibson told him that it was "within the discretion of the Judge". I can take that as meaning that he could now bring a claim and if it was out of time but he had been deterred by the fees regime, that the

Judge could exercise his discretion to allow the claim to proceed even though it was out of time. I am aware anecdotally that there have been cases determined on that basis.

10.6 But that still does not get over why did the Claimant then do nothing from August 2017 until he presented his claim on 28 June 2018? The Claimant has not provided me with an explanation. I have very much sought to try and get one from him; but suffice it to say that all I have got is that he can only believe that he must have brought an earlier claim but then he contradicts himself by saying that the one before me is the first claim that he presented. From enquiries which I had made today, and which I of course provided to this hearing, there is no record of presentation of other than the claim before me.

10.7 What it means is that I do not have a viable explanation as to why it was not reasonably practicable to bring this claim once he was aware of the Supreme Court decision.

10.8 It therefore follows that I cannot find that it was not reasonably practicable for the Claimant to have brought his claim well before he did. Thus as the claim is well out of time, I dismiss it.

## **Conclusion**

11. The claim is dismissed as being out of time.

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Employment Judge Britton

Date: 13 June 2019

REASONS SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE