



**EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 3332431/2018**

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**Held at Edinburgh on 10 June 2019**

**Employment Judge: M A Macleod**

10 **Jill Morrison**

**Claimant  
In Person**

**Bestway Wholesale Ltd**

**Respondent  
Represented by  
Mr D Hay -  
Advocate**

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**JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Employment Tribunal is that the claimant's claim is dismissed  
for want of jurisdiction.

**REASONS**

1. The claimant presented a claim to the Employment Tribunal on 29 August 2018 in which she complained that she was unfairly dismissed from her employment by the respondent.
- 25 2. The respondent submitted an ET3 in which they resisted the claimant's claim.
3. Following a number of Preliminary Hearings, the case was set down for a Preliminary Hearing (Open) on 10 June 2019 for the purpose of determining the preliminary point of whether the Tribunal has jurisdiction to hear this case.
- 30 4. The claimant appeared on her own behalf, and the respondent was represented by Mr Hay, Advocate.

5. A bundle of productions was presented by the respondent, on which reliance was placed throughout the hearing.
6. The claimant gave evidence on her own account.
7. Based on the evidence led and the information presented, the Tribunal was  
5 able to find the following facts admitted or proved.

### Findings in Fact

8. The claimant commenced employment with the respondent on 19 April 2000, as a warehouse operative.
9. Her employment came to an end with effect from 16 April 2018, when she  
10 was informed of her dismissal without notice on the grounds of gross misconduct.
10. In the ET3 submitted on behalf of the respondent, it was noted at paragraph 3.1 that “We have not seen an EC Certificate on which the Respondent has been named. We believe that the requirements of the EC process have not  
15 been complied with.”
11. The claimant’s ET1 was submitted by her without the benefit of legal advice or any other assistance.
12. In the ET1, she ticked the box, at paragraph 2.3, marked “No”, in answer to the question, “Do you have an Acas early conciliation certificate number?”
- 20 13. In response to the question following on from this, (“If No, why don’t you have this number?”), the claimant ticked the box marked “My employer has already been in touch with Acas.”
14. The claimant’s dismissal arose following an accusation made against her that she had been overheard on a telephone call using racial words to a  
25 customer who had refused to take an order. She was invited to attend a disciplinary hearing on 13 April 2018, by letter dated 11 April 2018 (73). The hearing was adjourned on 13 April, and reconvened on 16 April 2018, when the claimant was informed that Mr Wilkie, the disciplinary manager, had taken the decision to dismiss her for gross misconduct, without notice. She

was therefore informed on that date that her employment would be terminated with effect from 16 April 2018. A letter confirming this decision and setting out the reasons for it was sent to her on 20 April 2018, again advising that her employment terminated with effect from 16 April 2018 (79).

- 5 15. The claimant was paid her salary by the respondent until 16 April 2018.
16. She appealed against the decision to dismiss her, by letter dated 1 May 2018, and an appeal hearing was fixed for 7 June 2018. David Good, General Manager, heard the appeal, and issued his decision, which was to reject the claimant's appeal and to uphold the dismissal decision, by letter  
10 dated 13 June 2018 (88).
17. The claimant understood, following her appeal decision, that she was entitled to challenge the dismissal before an Employment Tribunal, and understood that in order to do so, she must contact ACAS in order to put the Early Conciliation process in train. She said before me that she completed a  
15 form online in order to contact ACAS, and she assumed that when they had that form she had presented her claim to them. She referred to a letter which she received from ACAS and took that to mean that she had carried out the necessary steps to proceed with her claim.
18. The letter from Tony Martin, ACAS Conciliator, to the claimant was sent on  
20 22 November 2018 (45). In it, Mr Martin stated the following:

*"Dear Sir/Madam,*

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*The Employment Tribunal has sent a copy of your claim to Acas and I am  
25 the conciliator for this case. I have a legal duty to work with the parties to this dispute to see if I can help them settle their differences without the need for a tribunal hearing and I will be in touch with you as the case progresses towards a hearing..."*

19. The claimant explained that while completing the online form she thought  
30 she had completed the "ACAS part of it".

20. The claimant spoke to Jenny McDermott, Head of Human Resources for the respondent, based in London, by telephone. It is not clear when this conversation took place. However, on 9 August 2018, Ms McDermott emailed the claimant (52) to say:

5 “Jill,

*Thank you for your email and formal confirmation of your intentions; I will await contact from ACAS or your representative directly.”*

21. The claimant took from this and from the prior phone call that the respondent had contacted ACAS. She made no reference to such a phone call or any evidence that Ms McDermott had told her that she had contacted ACAS in her ET1 nor in her further and better particulars of claim (44) by email dated 15 April 2019.

22. The claimant said to the Tribunal that she did not know that her employment had ended until after the appeal had been rejected. She did not seek advice from anyone at that time. She said that she would have thought that she could not go to an Employment Tribunal until all the appeal meetings had been concluded.

### Submissions

23. For the respondent, Mr Hay laid out the statutory requirements relevant to this matter.

24. He observed that the statutory framework requires that the claimant prove that the respondent had contacted ACAS. The onus is upon her and she has failed to discharge that onus.

25. The reason why the claim was not rejected at the outset of the process was that she had indicated that there was a valid reason for her not having obtained an Early Conciliation Certificate from ACAS. There is no evidence, he submitted, on which the Tribunal can make a finding of fact that the respondent had taken steps to contact ACAS in this regard.

26. Mr Hay said that the reference in the claimant's evidence to a telephone call with Jenny McDermott had come as something of a surprise to the respondent, as it was not foreshadowed anywhere in the claimant's pleadings. The email from Ms McDermott (52) does not lend any support to her contention that the respondent had taken steps to contact ACAS. The letter from ACAS (45) does not show that they had been contacted before the claim was presented. It is a standard ACAS letter sent to all claimants after they submit their claim.
27. Mr Hay argued that there is no evidence to demonstrate that an exemption to the rules has been made out by the claimant. The requirement is for the claimant to have instituted Early Conciliation and for a certificate to be produced. There is no such certificate here. The claim falls therefore to be rejected, harsh as that may be.
28. He moved then to address the question of time bar. The claimant had 3 months from the date of termination of her employment within which to present her claim of unfair dismissal to the Tribunal. Even legally qualified persons have made the error the claimant seems to have made here, that the time for presenting her claim did not start running when the appeal was concluded, but at the date of termination. In this case, the letter of dismissal was quite clear that the claimant's employment ended on 16 April 2018. He suggested that given the date upon which it could be said that the claimant received the letter of dismissal could be estimated at 24 or 25 April, it is reasonable on the part of the respondent to calculate the time bar from that point. That would still require the claim to have been presented by 24 July 2018.
29. He submitted that it cannot be said that it was not reasonably practicable for the claim to have been presented within three months of dismissal. The claimant was capable of pursuing her internal appeal, and of chasing up her missing P45. Even if the claimant successfully overcame the difficulties with the lack of an Early Conciliation Certificate, she would not be able to continue with her claim on the basis that it is time barred, and that the

Tribunal should not exercise its discretion to allow the claim to continue albeit late.

30. Mr Hay concluded by suggesting that the Tribunal should dismiss the claim. He was unsure whether the claim should be rejected on the basis that it lacked an Early Conciliation number, or simply dismissed.

31. The claimant briefly suggested to the Tribunal that her difficulties in this case may have arisen either through anxiety or her lack of understanding of the process. She understood that she had 3 months from 7 June 2018 to present her claim to the Tribunal. She decided she would not submit her claim until she had been through the appeal process in full.

### **The Relevant Law**

32. Section 18A(1) of the Employment Tribunals Act 1996 (ETA) provides:

*“Before a person (‘the prospective claimant’) presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter.”*

33. The section goes on to prescribe the process which requires to be followed thereafter, including the issuing of an Early Conciliation Certificate if the conciliation officer concludes that a settlement is not possible, or the prescribed period expires without a settlement being reached.

34. Section 18A(7) provides for exceptional circumstances in which the claimant may institute relevant proceedings without complying with the requirement in subsection (1). That includes cases where section 18B applies because ACAS has been contacted by the person against whom relevant proceedings are being instituted.

35. The Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 supplement these provisions, and for the purposes of this case, Regulation 3 is relevant in providing the details of the exemptions on which claimants may depend. Regulation 3(1)(c) states:

*“A [the claimant] is able to show that the respondent has contacted ACAS in relation to a dispute, ACA has not received information from A under section 18A(1) of the Employment Tribunals Act in relation to that dispute and the proceedings on the claim form relate to that dispute;”*

5 36. I was referred to the decision of the Employment Appeal Tribunal in  
**Cranwell v Cullen UKEATPAS/0046/14/SM** as authority for the proposition  
that while the Rules of Procedure of the Employment Tribunal may operate  
harshly upon a particular claimant, there is, in the event that no Early  
Conciliation Certificate has been produced, no discretion upon the Tribunal  
10 to allow the case to proceed unless one of the relevant exemptions apply.

37. Rule 10 of the Employment Tribunals Rules of Procedure 2013 provides that  
the Tribunal “shall reject” a claim if it does not contain all of the following  
information (Rule 10(3)):

(i) *“an early conciliation number;*

15 (ii) *confirmation that the claim does not institute relevant proceedings; or*

(iii) *confirmation that one of the early conciliation exemptions applies.”*

38. Reference was also made to section 111 of the Employment Rights Act  
1996 in relation to the question of time bar.

### **Discussion and Decision**

20 39. The first issue for the Tribunal to address is whether the requirements of  
Rule 10 have been complied with by the claimant.

40. It is noted, as Mr Hay acknowledged, that this is not a case in which the  
claim has been rejected on initial consideration by the Tribunal. It appears  
that the claim was accepted on the basis that the claimant asserted that “My  
25 employer has already been in touch with Acas.”

41. The question before me is whether that was a correct statement of fact on  
the claimant’s part.

42. The evidence supporting the claimant's assertion is limited. Essentially, she relies on three adminicles of evidence:

(a) That ACAS have responded to her correspondence in November 2018;

(b) That Ms McDermott wrote to her to say that she would await hearing  
5 from ACAS; and

(c) That Ms McDermott told her in a telephone conversation prior to that email that she had, on behalf of the respondent, been in touch with ACAS.

43. I examine these points in turn.

10 44. Firstly, ACAS wrote to the claimant on 22 November 2018 (45) to tell her that the Tribunal had sent ACAS a copy of her claim. This clearly took place after the claimant's claim had been presented to the Tribunal. The letter says nothing in its terms about any contact having been made with them by either party prior to the claim having been presented.

15 45. Accordingly, this letter provides no support to the claimant's assertion that the respondent had been in touch with ACAS prior to the presentation of the claim to the Tribunal.

46. Secondly, Ms McDermott emailed the claimant on 9 August 2018 (52). In that email, Ms McDermott thanked her for her email (a copy of which was  
20 not produced) and for formal confirmation of her intentions. She then said "*I will await contact from ACAS or your representative directly.*"

47. That email does not say, nor can it be inferred to say, that the respondent had previously contacted ACAS to commence the early conciliation process or for the purpose of resolving the dispute. It simply confirms that she would  
25 await contact from ACAS or the claimant's representative. It is not for me to speculate precisely what Ms McDermott meant by that or why she referred to ACAS, but the burden of proof is upon the claimant to show that the respondent had already been in touch with ACAS about this dispute. There is no evidence from that email that that is the case.



48. Thirdly, the claimant said in evidence before me that she had spoken by telephone to Ms McDermott prior to this email exchange, and that in that conversation Ms McDermott had told her that the respondent had been in touch with ACAS.

5 49. No evidence was led by the respondent in relation to this matter. I am advised that the reason for this was that the respondent had no notice of the evidence which the claimant intended to give, and therefore did not understand that they needed to call any evidence to contradict it. I am prepared to accept that explanation, since there is no reference in either the  
10 ET1 or the claimant's further and better particulars to such a conversation having taken place.

50. It was open to the claimant to ask ACAS, at any stage prior to this hearing, for confirmation that the respondent had contacted them to initiate the process, but no evidence was led to demonstrate this. The email from  
15 McDermott indicates that the claimant had been in touch with the respondent, and was taking the initiative in the proceedings. Again, it is not for me to speculate as to what was said in that telephone call, particularly as the claimant was unclear as to when it took place, and did not set out exactly what was said in that call.

20 51. I do not consider that the claimant has been deliberately untruthful in this matter, but I am not persuaded that she has demonstrated that the respondent had in fact been in contact with ACAS such as to justify her claiming an exemption from the requirement to submit an Early Conciliation Certificate. It may be that the claimant understood from the conversation  
25 with Ms McDermott that such contact had taken place, but there is no evidence before me actually confirming that the respondent was in contact with ACAS such as to allow me to make a finding in fact about it. The best that can be said is that the claimant says that the respondent told her that they had been in touch with ACAS, but I am not prepared to go so far as to  
30 make that finding as a fact.

52. I am fortified in this view that the absence of any evidence from any party or source to support the assertion that the respondent had been in contact with ACAS about this dispute.

53. As a result, I have reached the conclusion that the requirements of Rule 10 have not been satisfied in this case, in that no early conciliation certificate was provided or has been provided to the Tribunal by the claimant, and no basis for her to claim the exemption has been presented to the Tribunal.

54. Accordingly, the Tribunal lacks jurisdiction to hear this case, and it must therefore be dismissed.

55. As a result of that conclusion, it is not necessary for me to address the other preliminary issue before me, that is, whether the claimant's claim was time barred.

56. The claimant's claim is therefore dismissed.

**Employment Judge: Murdo Macleod**

**Date of Judgment: 28 June 2019**

**57. Entered into the Register: 01 July 2019**

**58. And Copied to Parties.**