



by the Acas Conciliation Officer ("CO") that was dealing with the early conciliation process, that he had until 7 May 2018 in which to get his claim to the Employment Tribunal.

5. EJ Baron decided in the circumstances that it was necessary to adjourn the hearing in order to obtain evidence from the CO as to the advice or information she provided to the claimant as to the final date on which he could get his claim form to the Tribunal.
6. The Tribunal subsequently sent a letter to the Acas CO on 15 August 2018 seeking that evidence. The Tribunal has not received any response to that letter.
7. Notice of this preliminary hearing was sent to the parties on 23 April 2019 and identified the issue as originally set out in the Tribunal's letter of 12 June 2018.

### **This hearing**

8. At the start of the hearing I explained that I was unable to speak other than quietly because I had a very sore throat and a cough. However, the parties could hear me and it did not prove to be a problem.
9. I explained to the claimant in particular because he was unrepresented that there were two issues, one being whether he had sufficient service to bring an unfair dismissal claim and the second whether his claims were received by the Tribunal within the time limits set down by law. I told him that as the second issue could determine whether he was allowed to bring the claims at all, it made sense to deal with it first and move on to the second issue if it was necessary.
10. I explained that under the legislation that governs the various claims he has brought, there are strict time limits. The basic time limit is within 3 months of the incident giving rise to the claim. With his dismissal that was within 3 months of 10 December 2017. In order to bring a claim to the Tribunal a claimant must first start the process of early conciliation with Acas within that time limit. He had done so on 8 March 2018, which was within 3 months of his dismissal. The early conciliation process ended on 4 April 2018 when Acas issued a certificate. He then had a further month in which to get his claim to the employment tribunal. That period ended on 4 May 2018. Unfortunately for him he had not presented his claim until 5 May 2018. This meant that it was out of time and gave rise to the issue that I had to deal with today.
11. I explained that whilst one day might not seem a lot, the legislation about time limits is very strict. I have the discretion to allow him claim to proceed even though it is out of time. But he has to persuade me that it was not reasonably possible for him to bring the claim within the time limit and if so, whether he then brought the claim within a further reasonable period. One factor that can affect whether it was reasonably possible to get his claim to the tribunal in time is where he has taken advice from a person in authority, which includes Acas, and had been wrongly advised. This is why EJ Baron stopped the last hearing and directed the tribunal to write to the Acas Conciliation Officer about the advice or information she had given to the claimant.
12. I advised the claimant that we had not received any response to the written enquiry of the Acas CO which was made on 15 August 2018. The claimant had not received any from the Conciliation Officer either.
13. I then invited the claimant to give evidence. He said that he had looked through all of his emails from the Conciliation Officer but could find nothing referring to the time limits to bring a tribunal claim. However, he spoke to the CO on the telephone and she clearly told him that the deadline to get the claim to the tribunal was 7 May

2018. He was not certain of the date on which he spoke to the CO about this.
14. The respondent's solicitor made the point that of course the time limit could not be ascertained by the CO until the early conciliation process had ended and that 7 May 2018 bears no relationship to the dates of the start and end of early conciliation.
  15. I advised the claimant that Acas is an independent body and does not give legal advice (in its conciliation function). I said that my recollection from when I was in practice as a solicitor was that Acas send a covering email with the early conciliation certificate which states that you have at least one month to lodge your employment claim, but must take independent legal advice as to the time limits.
  16. The claimant looked on his mobile phone and found the email that was sent by the CO with the early conciliation certificate. I asked him to hand his phone to the respondent's solicitor to read the email and then pass it to me.
  17. I read the email on the claimant's phone. It was an email from the CO at Acas dated a 4 April 2018 at midnight attaching the certificate. The body of the email contained the following paragraph:

*“ACAS cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time.”*
  18. I asked the claimant when he had the conversation with the CO and what she said. He was not sure when the conversation was, it could have been before the certificate was issued or after. But there was an offer to settle the case and it was rejected and she told him that because the early conciliation had ended earlier than expected (presumably as the settlement negotiations had come to an end), this gave him more time in which to send in the tribunal form and so he had until 7 May 2018 to do this.
  19. I invited the respondent's solicitor to cross examine the claimant. She said that she had questioned the claimant at the previous hearing and was not clear why the CO would say this to the claimant on any level. Further, she said that without a response from the CO we only have the claimant's word for it. In addition, she said that we now we have the email from the claimant's phone saying that Acas does not give advice on time limits and you need to take legal advice. So why would the claimant rely on what he alleges the CO said.
  20. I then adjourned to consider the matter and to make a decision.

## **Decision**

21. With regard to a complaint of unfair dismissal, section 111(2) of the Employment Rights Act 1996 states that:

*“... [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).]”*
22. The time limits for the claims in respect of wages claims and notice pay claims are

set out in section 23 of the Employment Rights Act 1996 and article 7 of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 respectively and set out the same time limit and discretion as in section 111(2) above.

23. There are two limbs to this formula. First, the employee must show that it was not reasonably practicable to present his/her claim in time. The burden of proving this rests firmly on the employee (**Porter v Bandridge Ltd** [1978] IRLR 271, CA). Second, if s/he succeeds in doing so, the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.
24. Whether it was reasonably practicable for the employee to submit his claim in time is a question of fact for the tribunal to decide having looked at all the surrounding circumstances and considered and evaluated the employee's reasons.
25. The Court of Appeal in **Palmer & Anor v Southend on Sea Council** [1984] IRLR 119 considered the meaning of the words 'reasonably practicable' and concluded that this does not mean 'reasonable', which would be too favourable to employers and does not mean 'physically possible', which would be too favourable to employees, but means something like 'reasonably feasible', ie 'was it reasonably feasible to present the complaint to the [employment] tribunal within the relevant three months?' (as extended by the early conciliation provisions).
26. May LJ in **Palmer** stated that the factors affecting an employee's ability to present a claim within the relevant time limit are many and various and cannot be exhaustively described, for they will depend on the circumstances of each case. However, he set out a number of considerations from the past authorities which might be investigated ([1984] IRLR at 125). These included the manner of, and reason for, the dismissal; whether the employer's conciliation machinery had been used; the substantial cause of the employee's failure to comply with the time limit; whether there was any physical impediment preventing compliance, such as illness, or a postal strike; whether, and if so when, the employee knew of his rights; whether the employer had misrepresented any relevant matter to the employee; whether the employee had been advised by anyone, and the nature of any advice given; and whether there was any substantial fault on the part of the employee or his adviser which led to the failure to present the complaint in time.
27. When considering whether or not a particular step is reasonably practicable or feasible, it is necessary for the tribunal to answer this question 'against the background of the surrounding circumstances and the aim to be achieved'. This is what the 'injection of the qualification of reasonableness requires' (*Schultz v Esso Petroleum Ltd* [1999] IRLR 488, CA)
28. Where the employee satisfies the tribunal that it was not reasonably practicable to present his/her claim in time, the tribunal must then proceed to consider whether it was presented within a reasonable time thereafter. The Tribunal must exercise its discretion reasonably with due regard to the circumstances of the delay.
29. Whilst I had some sympathy for the claimant given the circumstances of his dismissal, I have to deal with the narrow issue of whether he had presented his claim to the employment tribunal in time and if it was not, whether it was not reasonably practicable of him to do so.
30. In his claim form the claimant said his employment ended on 10 December 2017 but the respondent's response states that dismissal was on 15 December 2017. In any event even taking the later date does not change the time limit to present the claim to the tribunal.

31. The claim for arrears of pay relates to wages which the claimant said in his claim form were held back at the end of December 2017 and kept for a month. In other words, they were paid late.
32. The notice pay claim arises on termination of his employment which was on 15 December 2017.
33. Whilst there is a reference to bonus money due for payment in the claimant's final salary which at the latest would be 31 December 2017. But in any event that does not change the time limit in which to lodge the tribunal claim.
34. So taking the date on which the claimant's employment ended, the effective date of termination was 15 December 2017 (on the respondent's case). The original time limit expired on 14 March 2018, the matter was referred to EC on 8 March and the EC Cert was issued on 4 April 2018 and so the time limit was extended to 4 May 2015. This final date is the same in respect of each of the claims.
35. I take into account that the normal position that Acas is an independent body that does not give advice in its conciliation function.
36. I do not dispute that the claimant was told by the CO that the time limit was 7 May 2018 but he is not when this conversation took place.
37. If we assume it was before the early conciliation certificate was issued it makes no sense because the extension of the time limit had not crystallized at that stage. If we assume that it was given after the certificate was issued, which the claimant is not sure of, it still makes no sense given the various dates involved in the calculation of the time limit.
38. But balance of probability, it is more likely than not that this conversation was shortly before the certificate was issued when the CO knew that the early conciliation process was going to end prematurely as indicated to the claimant in the conversation.
39. But in any event, notwithstanding the conversation with the Acas CO, the covering email sent with the certificate states quite clearly:  
  
*"ACAS cannot advise you about when a tribunal claim should be submitted. It is your responsibility to ensure that any tribunal claim is submitted on time."*
40. In the circumstances, I find that it was therefore reasonably practicable for the claimant to present his claim within the time limit because he should have taken independent advice as to the time limit as was clearly indicated in the email sent with the certificate.
41. As a result, the employment tribunal has no jurisdiction to hear the claimant's claim it having been presented outside the requisite time limits. His claim is dismissed.

Employment Judge Tsamados  
26 July 2019