EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100179/2019

Held in Edinburgh on 12 August 2019

Employment Judge A Kemp

Mr A Sisson	**Claimant** **Represented by:** **Ms A Bennie** **Counsel**
Carr Gomm	**Respondent** **Represented by:** **Mr B Docherty** **Solicitor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. The claims for unfair dismissal under the Employment Rights Act 1996 and for breach of contract under the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 are dismissed as the Tribunal does not have jurisdiction to consider them.

2. The Tribunal does have jurisdiction to consider the claim for discrimination under section 15 of the Equality Act 2010 and that claim shall proceed to a Full Hearing.

REASONS

E.T. Z4 (WR)

Introduction

1. The Tribunal held a Preliminary Hearing to consider whether it had jurisdiction to consider the claims made, which were for unfair dismissal, discrimination arising out of disability, and for notice pay, which is a claim of breach of contract.

2. The respondent alleged that in each case the claim had not been commenced within the statutory period, and that the Tribunal did not therefore have jurisdiction to consider it.

3. Evidence was heard from Mrs Donna Reynolds, and there was a Joint Statement of Facts that the parties had concluded, together with a Joint Bundle.

4. The claimant accepted that a Claim Form had not been presented timeously for each of the claims made.

Issues

5. The Tribunal identified that the following issues arose:

   (i) Was it reasonably practicable for the claimant to have presented the Claim Form for the claims of unfair dismissal and breach of contract timeously, ie on 4 January 2019?
   (ii) If not, was it presented within a reasonable period of time thereafter?
   (iii) Was the claim for harassment brought within a period that was just and equitable?

Facts

6. The Tribunal held the following facts to have been established, or had been agreed:

7. The claimant is Robert Alexander Sisson, known as Alexander Sisson.

8. He was employed by the respondent Carr Gomm from 6 July 2015 to 1 September 2018, on which latter date he was summarily dismissed.

9. He commenced Early Conciliation on 4 November 2018. The Early Conciliation Certificate was issued on 4 December 2018. It was issued in the name of “Robert Sisson”.

10. The claimant then instructed Mrs Donna Reynolds, a partner at Blackadders, Solicitors (“the firm”). The firm has offices in, inter alia, Edinburgh, Dundee and Glasgow.

11. Mrs Reynolds is a solicitor who qualified in 2004 and is accredited as a specialist in employment law and discrimination law by the Law Society of Scotland. She practices primarily from the Edinburgh office of the firm, which is at 5 Rutland Square, Edinburgh. She is a partner in that firm.

12. Prior to the break for the holiday over Christmas and New Year in 2018 Mrs Reynolds drafted a Claim Form for the claimant, and sent that to him for checking and instructions. He indicated that he wished to consider it, and the claim itself. In light of the date of the Early Conciliation Certificate, 4 January 2019 was the last date on which to present a Claim Form to the Employment Tribunal. Mrs Reynolds was aware of that date.

13. On 4 January 2019 Mrs Reynolds received instructions from the claimant from an email sent to her at 9.56, which she viewed relatively shortly thereafter.

14. That day was a Friday, and was the second working day after the Christmas and New Year holiday. The firm had a skeleton staff working that day in its Edinburgh office. Mrs Reynolds was working in the Edinburgh office. There were other staff also present that day, including a receptionist. There were also staff working in the offices in Glasgow, and the main office in Dundee, including colleagues in the employment team in which Mrs Reynolds worked.

15. The instructions the claimant gave in that email included amendments to the claim drafted, and confirmation to proceed with it. Mrs Reynolds completed details for the claim. She then attempted to present it using an online portal to do so. The online portal is operated on behalf of the Tribunal Service, and involves completing details for the Claim Form electronically She completed the form to the point where a button requires to be pressed electronically to submit it. Despite attempting to do so on a number of occasions, she could not. Her attempts to do so occurred in the period of about fifteen minutes up to about 11.30 am that day.

16. Mrs Reynolds then printed out the Claim Form, prepared a pdf version of the paper apart, and sent an email to the Glasgow Employment Tribunal at 11.41 am that day with the Claim Form and paper apart attached. Her covering message in the email stated:

> "We act for Mr A Sisson and we are instructed to present claims of unfair dismissal and disability discrimination on his behalf. To that end, please find attached the Claimant's ET1. Regrettably, we were unable to submit the claim form online. We apologise for any inconvenience this may cause"

17. The Claim Form was made in name of Alexander Sisson.

18. Mrs Reynolds did not check the procedure for presenting claims to the Tribunal before sending that email. She followed what was the most common method for her of communicating with the Tribunal, which was by email. The

large majority of her practice is for respondents, and involves sending the Response Form on their behalf by email. Mrs Reynolds was aware of the Practice Direction with regard to presenting Claim Forms, but had not recalled it when sending the email.

19. Sending that email generated an automatic response from the Glasgow Employment Tribunal. It had the heading “Auto response”. It also included the following “We aim to deal with new claims within 3-5 working days. Please note that any Claim or Response Forms will need to be checked before they are accepted and this reply is only confirmation of receipt.”

20. Mrs Reynolds considered that that response was confirmation that the Claim Form had been received.

21. She had a series of client meetings from noon until about 4pm on 4 January 2019. When she left the office later that day, she considered that the Claim Form for the claimant had been presented successfully in accordance with the Rules.

22. On 7 January 2019 the Employment Tribunal Service advised Mrs Reynolds by email, with a letter attached, that it was returning the Claim Form due to a failure to submit it by one of the three prescribed methods of presenting it. The letter indicated that from 29 July 2013 there were only three prescribed methods to do so:

    1. Online by using the online submission service, also called the portal
    2. By post to the Glasgow office
    3. By hand to a designated Employment Tribunal office, during office hours, which gave the addresses for the offices at Glasgow, Edinburgh, Dundee and Aberdeen.

23. Those prescribed methods are set out in a Presidential Practice Direction given on 2 November 2017, (being that referred to above).

24. The letter also stated that as the prescribed method had not been used, it could not be accepted and was returned to her.

25. That same day Mrs Reynolds printed out the Claim Form and paper apart, and personally attended at the Dundee Tribunal office to present it. She did so within one hour of her receiving the email. It was accompanied by a letter of that date explaining the position.

26. By letter sent by post on 14 January 2019 Mrs Reynolds was informed by the Tribunal that the Claim had not been accepted as the name given on the Claim Form was different to that on the early conciliation certificate.

27. On 17 January 2019 Mrs Reynolds received that letter. She sent an email to the Tribunal requesting that the decision not to accept the Claim Form be reconsidered. She explained that the claimant "goes by only his middle name "Alexander" or "Alex" for short." It indicated that she did not know why ACAS had used the full name but accepted that the claimant must have provided that.

28. On the same date the Tribunal wrote to Mrs Reynolds to confirm that the reconsideration had taken place and that the claim was treated as presented as at 17 January 2019. It was then intimated to the respondent, which presented its Response Form on 19 February 2019.

29. The firm's Edinburgh office at 5 Rutland Square, Edinburgh is approximately 0.2 miles from the office of the Edinburgh Employment Tribunal at 54- 56 Melville Street, Edinburgh, and it would take approximately five minutes to walk from the firm's office to the Tribunal office.

Claimant's submission

30. Ms Bennie helpfully had prepared a written submission, which she spoke to orally. The following is a basic summary.

31. She asked me to accept the evidence given by Mrs Reynolds. It was clear, and had been accepted by Mrs Reynolds, that she had made a mistake when on 4 January 2019 she sent an email to the Tribunal with the Claim Form and paper apart. It was a genuine mistake, not a flouting of the rules. She had realised that on receipt of the email on 7 January 2019. She had then submitted the second application by hand. That had later been rejected, but on reconsideration was then accepted with effect from 17 January 2019.

32. She set out in detail the provisions as to time bar for the claim of unfair dismissal, with the same test applying to that for breach of contract. She referred to section 111 of the Employment Rights Act 1996, and the definition of the effective date of termination found in section 97. The effective date of termination was 1 September 2018. Early Conciliation had commenced timeously on 4 November 2018, with the certificate issued on 4 December 2018. The Claim Form, the ET1, required to be presented by 4 January 2019.

33. She referred to Rule 8, with the definition of "present" in Rule 1, and the terms of Rule 85 as to delivery to the Tribunal. She referred to Rule 11 with regard to Practice Directions, and that a Practice Direction was issued on 2 November 2017.

34. It was argued that this was not a case of miscalculation. There had been an attempt to present the Claim using the online facility, but that had not succeeded.

35. On 4 January 2019, the second working day after return from the holiday, the firm was working with a skeleton staff. Mrs Reynolds genuinely believed that

the first Claim Form had been presented on 4 January 2019 and therefore in time.

36. She referred to the two limbs of section 111, the first being to show that it was not reasonably practicable to have presented the claim in time. Whether that was the case or not was a question of fact – ***Walls Meat Co Ltd v Khan [1979] ICR 52***.

37. Her submission was that it was not reasonably practicable to present the second application in time, and she referred in particular to ***Adams v British Telecommunications plc UKEAT/0342/15/LA,*** She also sought support from ***Baisley v South Lanarkshire Council [2017] ICR 365*** and ***North East London NHS Foundation Trust v Zhou UKEAT/0066/18/LA.***

38. She accepted that the claimant was represented by solicitors and that the Dedman principle applied, but said that what should be considered was the second application, not the first, although the first was not irrelevant, and was part of the background. It was accepted that the firm had been in error on 4 January 2019, but it was said that their actions were not unreasonable in the circumstances.

39. On the second limb of the test under section 111 she argued that Mrs Reynolds had acted quickly on each occasion, and in fact no real argument to the contrary was presented by Mr Docherty.

40. In so far as the discrimination claim was concerned, she referred to section 123 of the Equality Act 2010, and the authority of ***Rathakrishnan v Pizza Express (Restaurants) Limited [2016] IRLR 278***. She referred under the issue of what is just and equitable to the balance of prejudice. The delay was short, and fully explained. The critical factor was prejudice, and the discrimination claim should be heard.

41. In conclusion she invited me to allow all claims to proceed.

Respondent's submission

42. Mr Docherty had also helpfully produced a written submission and the following is a basic summary of that and his oral submission. His essential point was that Ms Bennie was wrong to focus on the second application. The focus was on what was reasonably practicable on 4 January 2019. Mrs Reynolds had accepted that she had made a mistake in not presenting the claim in the manner that was provided for. She could have done so. There were other staff in the Edinburgh office, or other offices, who could have delivered it personally. It could have been posted. The principle from the case *of* ***Dedman v British Building and Engineering Appliances Limited [1973] IRLR 379***. He also referred to ***Walls*** (above), ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** and ***Zhou*** (also above). It was reasonable to have been aware of the Practice Direction, and acted upon it. There had been about five and a half hours to do so that day.

43. There was no detailed submission made in relation to the discrimination claim beyond noting that it was for the claimant to satisfy the Tribunal that it was just and equitable to receive it.

The law

Timebar (a) unfair dismissal

44. Section 111 of the Employment Rights Act 1996 provides as follows, in respect of the claim for unfair dismissal:

> "**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).”

(b) Breach of contract

45. The provision for jurisdiction of a claim for breach of contract, for notice pay, is found within paragraph 7 of the Employment Tribunals (Extension of Jurisdiction) (Scotland) Order 1994 which states:

“7 **Time within which proceedings may be brought**

[Subject to article 8A and 8B, an employment tribunal] shall not entertain a complaint in respect of an employee's contract claim unless it is presented—

(a) within the period of three months beginning with the effective date of termination of the contract giving rise to the claim, or

(b) where there is no effective date of termination, within the period of three months beginning with the last day upon which the employee worked in the employment which has terminated, or

where the period within which a complaint must be presented in accordance with paragraph (a) or (b) is extended by regulation 15 of the Employment Act 2002 (Dispute Resolution) Regulations 2004, the

period within which the complaint must be presented shall be the extended period rather than the period in paragraph (a) or (b).]

(c) where the tribunal is satisfied that it was not reasonably practicable for the complaint to be presented within whichever of those periods is applicable, within such further period as the tribunal considers reasonable."

(c) Discrimination

46. Section 123 of the Equality Act 2010 provides as follows:

"**123 Time limits**

(1) [Subject to section 140A and 140B] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable……."

Early Conciliation

47. Before proceedings can be issued in an Employment Tribunal, prospective claimants must first contact ACAS and provide it with certain basic information to enable ACAS to explore the possibility of resolving the dispute by conciliation (Employment Tribunals Act 1996 section 18A(1)). This process is known as 'early conciliation' (EC), with the detail being provided by regulations made under that section, namely, the Employment Tribunals (Early Conciliation: Exemptions and Rules of Procedure) Regulations 2014 SI 2014/254. They provide in effect that within the period of three months from the effective date of termination of employment EC must start, doing so then extends the period of time bar during EC itself, and is then extended by a further month for the presentation of the Claim Form to the Tribunal. If not, then a Tribunal cannot consider a claim unless it was not reasonably

practicable to have done so in time, and then if EC starts, and the Claim is presented, within a reasonable period of time.

Presenting a Claim

48. The provisions for presenting claims to the Tribunal are found in the Rules at schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The material provisions are:

> **1. Definitions**
> ……..“present” means deliver (by any means permitted under rule 85) to a tribunal office……..”
>
> “8 **Presenting the claim**
> (1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under Rule 11 which supplements this rule….
>
> 85 **Delivery to the Tribunal**
> (1) Subject to paragraph (2) documents may be delivered to the Tribunal
> (a) By post
> (b) By direct delivery to the appropriate tribunal office….
> (c) By electronic communication
> (2) A claim form may only be delivered in accordance with the practice direction made under regulation 11 which supplements rule 8…….”

49. The Presidential Practice Direction issued, amending that in force up to that date, provides as follows:

> **Presidential Practice Direction – Presentation of Claims**

1. Rule 8 (1) of the Employment Tribunals Rules of Procedure (as set out in Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure Regulations 2013) is in the following terms:

> "Presenting the claim
>
> 8.—(1) A claim shall be started by presenting a completed claim form (using a prescribed form) in accordance with any practice direction made under regulation 11 which supplements this rule."

2. This Presidential Practice Direction, which sets out the methods by which a completed claim form may be presented, is made in accordance with the powers set out in Regulation 11 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. The Practice Direction has effect on and from 26 July 2017.

Methods of presenting a completed claim form

3. A completed claim form may be presented to an Employment Tribunal in Scotland:

1. Online by using the online form submission service provided by Her Majesty's Courts and Tribunals Service, accessible at www.employmenttribunals.service.gov.uk;

2. By post to Employment Tribunals Central Office (Scotland), PO Box 27105, GLASGOW, G2 9JR.

3. Only during the period 26 July 2017 to 31 July 2017 inclusive, and not otherwise by email to GlasgowET@hmcts.gsi.gov.uk.

4. By hand to an Employment Tribunal Office listed in the schedule to this Practice Direction [which lists the offices at Aberdeen, Dundee, Edinburgh and Glasgow together with their addresses].

4. The Presidential Practice Direction dated 14 December 2016 is hereby revoked.

Shona Simon President, Employment Tribunals (Scotland) Dated: 02 November 2017"

Case law

50. The burden of proof is on the claimant to prove that it was not reasonably practicable to present the complaint in time: ***Porter v Bandridge Ltd [1978] IRLR 271***.

51. The question of what is reasonably practicable is explained in a number of authorities, particularly ***Palmer and Saunders v Southend on Sea Borough Council [1984] IRLR 119***, a decision of the Court of Appeal in England. The following guidance is given:

"34. In the end, most of the decided cases have been decisions on their own particular facts and must be regarded as such. However, we think that one can say that to construe the words "reasonably practicable" as the equivalent of "reasonable" is to take a view too favourable to the employee. On the other hand, "reasonably practicable" means more than merely what is reasonably capable physically of being done. … Perhaps to read the word "practicable" as the equivalent of "feasible", as Sir John Brightman did in Singh's case and to ask colloquially and untrammelled by too much legal logic, 'Was it reasonably feasible to present the complaint to the Industrial Tribunal within the relevant three months?' is the best approach to the correct application of the relevant subsection.

> 35…….. It will frequently be necessary for it to know whether the employee was being advised at any material time and, if so, by whom; of the extent of the advisors' knowledge of the facts of the employee's case; and of the nature of any advice which they may have given to him. In any event it will probably be relevant in most cases for the Industrial Tribunal to ask itself whether there has been any substantial fault on the part of the employee or his advisor which has led to the failure to comply with the statutory time limit. Any list of possible relevant considerations, however, cannot be exhaustive and, as we have stressed, at the end of the day the matter is one of fact for the Industrial Tribunal taking all the circumstances of the given case into account.."

52. In ***Asda Stores Ltd v Kauser UKEAT/0165/07***, a decision of the Employment Appeal Tribunal, Lady Smith at paragraph 17 commented that it was perhaps difficult to discern how:

> "'reasonably feasible' adds anything to 'reasonably practicable', since the word 'practicable' means possible and possible is a synonym for feasible. The short point seems to be that the court has been astute to underline the need to be aware that the relevant test is not simply a matter of looking at what was possible but asking whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done."

53. ***Marks and Spencer plc v Williams-Ryan [2005] IRLR 562*** set out the issues to consider when deciding the test of reasonable practicability, which included (i) what the claimant knew with regard to the time-limit (ii) what knowledge the claimant should reasonably have had and (ii) whether he was legally represented.

54. That followed the earlier cases of ***Dedman*** in which it was stated "if a man engages skilled advisers to act for him – and they mistake the time limit and

present the claim too late – he is out. His remedy is against them" and ***Walls*** in which it was stated "if he or his advisers could reasonably have been so expected, it was his or their fault, and he must take the consequences."

55. In ***Northamptonshire County Council v Entwistle [2010] IRLR 741*** it was held that just because a solicitor had been acting for the claimant does not mean that the argument as to reasonable practicability cannot be made. It is a question of fact and circumstance. There may be occasions where despite the fact of or ability to take advice from a solicitor, it remained not reasonably practicable to have presented the Claim in time. But the EAT added in relation to the statutory test under section 111:

> "Even construing it as liberally as possible in favour of the employee, I cannot see how it can be said that it was not reasonably practicable for the claimant to claim in time when, if his solicitors had given him the advice which they should have done, the council's initial error would have had no effect."

56. The test in a discrimination claim is different, and involves an assessment of what period would be just and equitable. Where a claim is submitted out of time, the burden of proof in showing that it is just and equitable to allow it to be received is on the claimant ***Robertson v Bexley Community Centre [2003] IRLR 434***.

57. Even if the tribunal disbelieves the reason put forward by the claimant for late presentation of a claim it should still go on to consider any other potentially relevant factors such as the balance of convenience and the chance of success: ***Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] IRLR 278,*** in which there is a review of authority, but it is a multi-factorial issue, and no one matter is determinative.

Discussion

(i) Discrimination

58. I start by discussing the test for the claim made under section 15 of the Equality Act 2010, applying the terms of section 123. I consider that it is just and equitable to allow that to proceed. I take into account that the delay was short, at worst 13 days, and the reason for that delay has been fully explained by Mrs Reynolds, who made a mistake. It was the kind of mistake that it is easy for any professional person to make. It was made in circumstances of that being the last day on which to lodge a claim timeously, where the online facility had not worked, and where she had client meetings to commence within about half an hour. She acted promptly when that was discovered, and although the second claim was rejected initially the explanation was accepted on reconsideration.

59. There was, significantly, no suggestion of any prejudice caused by that to the respondent, but the claimant would suffer prejudice if unable to pursue his claim against the respondent. It is not possible to assess the strength or weakness of his claim under that statute, partly as the respondent has not set out its position fully, but that does not I consider prevent the finding that I have made. There is sufficient pled to at least make a stateable case. If the claimant establishes n evidence what is pled i, he has a reasonable prospect of success. The balance of prejudice therefore very strongly favours the claimant. The respondent did not seriously argue to the contrary. I consider that the statutory test, as explained in the authority set out above, has been met by the claimant.

60. The claim for discrimination under section 15 shall therefore proceed to a Full Hearing. I have already noted in that regard that the respondent has not pled a defence to that claim in full, and I direct that it make any application it wishes to amend its Response Form within 14 days of its receipt of this Judgment,

after which a Preliminary Hearing should be held by telephone for the purposes of case management.

(ii) Unfair dismissal and breach of contract

61. The issue in respect of the claims for unfair dismissal and breach of contract is I consider substantially more difficult. In each case the test is that of reasonable practicability. There are competing factors at play. As a matter of background, the claimant did not confirm his final instructions until what was agreed to be the last day to present the claim timeously. Mrs Reynolds then sought to do so using the online facility. I accept that that did not function as it should have done. For an unexplained reason, it was not possible to submit it in that manner. The portal was not working properly.

62. I considered at some length the judgment of Lord Justice Brandon in ***Walls*** in which he said:

> "The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance."

63. The failure of the portal, which would not allow the claim to be submitted, did interfere with and inhibit the presentation of the claim, at least to an extent. I consider however that it did not do so to such an extent that that of itself renders presentation timeously not reasonably practicable. I took into account in that regard that the claimant was represented by a firm of solicitors with a number of offices, and resources in each. There was also over five hours of time left to effect hand delivery to one of the offices where that was competent.

64. Mrs Reynolds then sent an email to the Glasgow Tribunal office. That did not accord with the Practice Direction, and it was not presenting the Claim as required by the Rules. It has been accepted that that was an error on her part. She was aware of the terms of the Practice Direction, but in the pressure of the events that day did not recall it. She did also not undertake any check of the position. She followed what was her normal practice in corresponding with the Employment Tribunal using email.

65. The explanation included that this was the second day back from holiday, there was a skeleton staff working at the Edinburgh office, she had a series of meetings from 12 to 4 that day. She mainly acted for respondents, and submitted Response Forms for those clients by email.

66. These are all entirely understandable reasons at a human level. I have, I confess, considerable sympathy for Mrs Reynolds. It was not her fault that the online facility was not working. Had it been, the Claim Form would have been presented on time.

67. But I have been driven to conclude that it was not reasonable for her, an experienced solicitor who is also a specialist in employment law, to have attempted to overcome that impediment by a method that was not in accordance with the rules, and Practice Direction, which she accepted she knew, and as a solicitor ought to have been aware of.

68. There was still time to effect timeous delivery of the Claim Form at one of the relevant Tribunal offices. Post would not have been effective, despite that being suggested by the respondent, as this was the last day to present the claim and posting it would not have led to timeous receipt.

69. As it was the last day, there was a need to make an effective presentation of the claim in accordance with the rules. I consider, regretfully, that Mrs Reynolds was at substantial fault in not doing so. As an experienced solicitor,

she should have been aware of the Practice Direction and provisions of the Rules, or if in any doubt to have checked them.

70. That is one factor to have regard to, under reference to ***Palmer.*** I use the word fault in its non-technical sense, not under the authority of ***Hunter v Hanley [1955] SLT 213*** on professional negligence claims. That involves different considerations. That finding of fault is not however determinative. All of the circumstances must be considered.

71. Although I have considered the authority of ***Adams***, on which Ms Bennie placed particular reliance, I do not consider that it takes matters in this case as far as she argued. Its facts were different.

72. That was a case where the claimant had not, at that point, had legal representation to prepare the Claim, which she did herself, but attended with the solicitor she had that day instructed at the Tribunal office and hand delivered the Claim Form on 16 February 2015. The last day to do so had been agreed to be 17 February 2015, although may have been 18 February 2015. That made no material difference. The material facts are as follows:

> "3. The ACAS early conciliation certificate number was R078129/14/07, but the number entered on the form by the claimant omitted the last two digits, the "07", so that the early conciliation certificate number was incomplete and accordingly inaccurate. On 17 February the employment tribunal's central office returned by post the claim form and the cheque to the claimant's solicitor, stating that it could not be accepted because the ACAS certificate number was inaccurate and the claim form would therefore have to be resubmitted.
>
> 4. The form was not received back by the claimant's solicitor until 19 February. On that date a second claim form was completed."

73. At paragraphs 18 and 19 the following comments are made:

> "18.
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> The focus is accordingly on the claimant's state of mind viewed objectively. The employment judge did not focus on the second claim and did not simply use the first claim as a guiding light in determining the factual questions she had to determine in relation to the second claim. Had she done so, a number of matters could and would have been considered. First, having lodged the first claim on 16 February 2015 believing it to be complete and correct, the claimant would have had no reason to lodge the second claim on that date. Secondly, the claimant cannot have been aware of the mistake she made in transposing the certificate number until after the limitation period expired because, had she become aware of it, for example on 16 February when she was in the process of presenting the complaint, she would have corrected it. Moreover, in the period between 16 and 19 February she laboured under the mistaken belief that the first claim had been correctly presented without any defect. Those are the reasons why the second claim was not presented until 19 February, but none of those points appear in the employment judge's consideration.
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> 19
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> The question for the tribunal, in those circumstances, was not whether the mistake she originally made on 16 February was a reasonable one but whether her mistaken belief that she had correctly presented the first claim on time and did not therefore need to put in a second claim was reasonable having regard to all the facts and all the circumstances. In that regard, it seems to me, it must be assumed that the claimant's error was genuine and unintentional. Further, as I have already indicated, it must be assumed that she was altogether unaware of the error, since had she been aware of it no doubt she would not have made it or it would have been corrected".

74. The essence of that case, as I read it, is that it was reasonable for the claimant to believe that she had presented a valid claim on time, despite the error that she had made.

75. There are some similarities with the present claim, but material differences. The claimant in the present case was represented by a specialist solicitor. That this was the last date on which to present a claim timeously was known. The fact of a Practice Direction was known. There were over five hours in which to present a claim in accordance with the provisions. Although Mrs Reynolds believed that she had presented the claim on 4 January 2019, there was not a proper basis for that belief. It was not reasonably held in all the circumstances, in my judgment.

76. ***Baisley*** was also a case of a mistake but in relation to an appeal over fee remission. The basic facts were that the claimant lodged a claim of unfair dismissal with the employment tribunal, followed by a fee remission application, within the time limit following the issue of an early conciliation certificate. The fee remission application was refused by the Employment Tribunal Service, and an appeal notice against the refusal, faxed by the claimant's solicitors, was not received by the tribunal service. The claim was rejected by the tribunal service under rule 11(3) for failure to pay the appropriate fee. Five days later the claimant presented a second claim together with the correct fee, and, time having by then expired, sought an extension of time, pursuant to section 111(2)(b) of the Employment Rights Act 19962. The Tribunal rejected that argument, and the claimant appealed to the EAT.

77. Lady Wise referred to the role of professional advisers, who had sought to fax the appeal against fee remission unsuccessfully. On that issue she said

> "Standing that the problems they had encountered with their fax machine were not understood to include the non-receipt of faxes by

> the recipient, describing such an omission as "fault" seems to me to demand something approaching a perfectionist method of working. I do not consider that it can safely be concluded that any reasonable solicitor would have made such an inquiry."

78. She concluded that those circumstances that did not prevent a finding that it had not been reasonable practicable to present a claim timeously. The solicitors had not been at fault, in her decision. That contrasts with the present case.

79. ***Zhou*** was a protected disclosure case where the claimant had instructed solicitors but to save cost had prepared the Claim Form herself. She had incorrectly transcribed the Early Conciliation certificate number. It was rejected as a result, and a new claim presented with the correct information but by then out of time. The mistake was hers, not that of a solicitor, and the decision was to the effect that it was not reasonable to require solicitors not paid to do so to check such details in a Claim Form the claimant had herself drafted.

80. The present claim is I consider a different set of facts. It relates to the rules for presenting a Claim, with that taking place on the very last date on which to seek to do so timeously, by an experienced and specialist employment solicitor who had been instructed, albeit very late as it was on the last day, to do so.

81. That an error was made has been candidly, and very properly, accepted. Simply because a solicitor is instructed is not the end of the enquiry, as has been commented in the case law above. This is also not a case of mistaking the end of the time-limit, as in ***Dedman***.

82. I do not consider that one can take as little notice of the first Claim Form having been submitted in a manner that was not in accordance with the rules, by a solicitor, and then seek to use that mistake as a basis to argue that there

was a belief that the claim had been presented such that the focus is on the second application, which was not made earlier because that mistake was not known, as Ms Bennie submitted. Her argument was that the Tribunal was concerned with the second application made on 7 January 2019.

83. I do not accept that submission. I consider that the assessment must be of the period during which the claim can timeously be presented and in this case that is the events on 4 January 2019. The question I must consider is whether or not it was reasonably practicable for Mrs Reynolds to have presented the Claim in accordance with the rules on that day. What happened thereafter is relevant to the second limb.

84. I do fully accept that she made a mistake, and that it was a genuine one. I also accept that it was in the context of the second day after the holiday over new year, with a skeleton staff at work in the Edinburgh office in which she worked, and with client meetings arranged for noon to 4pm. It was also made in the context of the portal not working when she tried to use it.

85. The issue however is not whether there was a mistake that was genuine, but whether it was reasonably practicable for the claimant, acting through his solicitor, to have presented the claim timeously. I have concluded that it was reasonably practicable to have done so, even where that was made more difficult by the problems encountered using the online facility that morning. It was reasonably practicable to have delivered a Claim Form to one of the offices in accordance with the Rules and Practice Direction. The firm is one with a number of offices. Mrs Reynolds could have done so herself, taking it to the Edinburgh office at 54-56 Melville Street, Edinburgh. I have relied on judicial knowledge to note that this is a distance of about 0.2 miles and would take approximately five minutes to walk each way. Alternatively she could have instructed another member of staff in that office to do so, or to have instructed someone in one of the offices in Dundee, where the main office is, Glasgow or Aberdeen to do so by printing out the documents and hand delivering it to the local Tribunal office.

86. The documentation had been prepared. It was a matter of having it delivered to an office by 4pm that day. There was sufficient time and resource reasonably available to do so. The reason it was not done was that Mrs Reynolds had not recalled the terms of the provisions as to presentation of claims, and did not check them. Had she done so, the Claim Form would I consider have been presented timeously. To amend the phrase from ***Entwhistle,*** had Mrs Reynolds acted as she ought to have done, following the terms of the rules and Practice Direction, the problem with the portal would have been overcome.

87. The present case is in my judgment materially different to the circumstances of ***Adams*** in that in that case the claimant had a reasonable basis to consider that her Claim Form had been presented successfully. Unfortunately, Mrs Reynolds in my judgment did not. It is materially different to ***Baisley*** on the basis that there the solicitor was not at fault, and in this case she was. It is materially different to ***Zhou*** on the basis that there the claimant herself made a mistake as to the early conciliation detail, but in this case the claimant was represented by a solicitor, and the error was as to presentation of the claim itself.

88. In light of the conclusions reached above the Tribunal does not I consider have jurisdiction over the claims as to unfair dismissal, and breach of contract. The second limb of the test is only engaged if the first limb is met.

Conclusion

89. I require, with regret, to dismiss the claims for unfair dismissal and breach of contract on the basis that the Tribunal does not have jurisdiction to consider them.

90. The claim under section 15 of the Equality Act 2010 is within the jurisdiction of the Tribunal and it shall proceed to a Full Hearing, with arrangements for a case management Preliminary Hearing to be made as set out above.

Date of Judgement: 21st August 2019
Employment Judge: A Kemp
Date Entered in Register: 27th August 2019
And Copied to Parties