



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr S Jones  
**Respondent:** Coleg Gwent  
**Heard at:** Cardiff **On: 26 November 2019**  
**Before:** Employment Judge RL Brace

**Representation:**

Claimant: In person  
Respondent: Mr M Blitz (Counsel)

## JUDGMENT

**JUDGMENT** having been sent to the parties on **27 November 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. These written reasons are a slightly amended transcribed version of the oral reasons delivered by Employment Judge at the conclusion of the hearing.

### WRITTEN REASONS

1. The issue before me today is whether the claimant's unfair dismissal complaint was presented outside the time limits in sections 111(2)(a) & (b) Employment Rights Act 1996 and if so, should it be dismissed on the basis that the Tribunal has no jurisdiction to hear it?
2. Further or alternatively, because of those time limits (and not for any other reason), should the unfair dismissal complaint be struck out under rule 37 on the basis that it has no reasonable prospects of success and/or should a deposit order be made under rule 39 on the basis of little reasonable prospects of success?

3. Dealing with these issues may involve consideration of subsidiary issues including:
  - (i) whether it was “not reasonably practicable” for the unfair dismissal complaint to be presented within the primary time limit;
  - (ii) what the effective date of termination was.
4. I have been provided with a bundle from the Respondent (“Black Bundle”) which the respondent contend is an agreed bundle, the claimant having sought to add additional documents at page 48 onwards which the respondent did not consider necessary to the preliminary issue, but nevertheless agreed to be included. These were documents which, by and large, were relevant to the substantive issues in this case.
5. On 22 November 2019 the claimant had emailed the tribunal indicating that the bundle of documents that he had received from the claimant did not contain any of the documents he had submitted to comply with the CMO from EJ Davies of 28 June 2019. In response the claimant was directed to bring along his own documents, but only those that were not in the respondent’s bundle already, paginated and in triplicate.
6. On the morning of this hearing the claimant attended and presented a separate bundle (the “Red Bundle”) which contained:
  - (i) Copy correspondence between the claimant and ACAS and/or his trade union representative, Mr Rodney Chambers (C1-C10)
  - (ii) A copy of an email from the claimant to [cardiffet@Justice.gov.uk](mailto:cardiffet@Justice.gov.uk) dated 20 December 2019 (C11);
  - (iii) Conciliation notes prepared by Mr Chambers (C12-C17);
  - (iv) Copy pleadings and correspondence with the ET (C18-C29); and
  - (v) Documents relevant to the substantive issue in this case.
7. The claimant also provided a witness statement of his own evidence and a witness statement for a Mr Chambers, his representative in the internal proceedings.
8. At the outset of the hearing I sought to determine why an agreed bundle had not been prepared and what were the relevant documents within each each of the Black Bundle and the Red Bundle.
9. There is a dispute between the parties as to when documents were disclosed, which I did not determine as I was keen to progress the preliminary hearing and needed to understand whether that had an impact on either parties’ ability to deal with the preliminary issue before me.
10. In resolving this case management, it quickly became clear that the claimant’s primary position was that he had submitted his claim in time as he had sent the EC Certificate number to the ET on 20 December [20]. Mr Blitz, until today, had not been provided with a copy of the email and was until this morning not aware of its existence. He accepted that this may have been as a

result of his instructing solicitor not having provided him a copy within his instructions.

11. At this point I confirmed to the claimant that the claim against Coleg Gwent had been accepted by the tribunal on 18 February 2019, and there was no evidence on the ET file, of the email of 20 December 2018 having been received. The claimant was unable to provide a copy of an automated receipt from the tribunal despite having his email available on his mobile phone. He maintained he had not received one. We took the opportunity to adjourn so that Mr Blitz could consider the additional documents in the Red Bundle and I could review the ET file to ascertain if the email of 20 December 2018 had been in fact received, but misfiled.
12. Both the claimant and Mr Blitz for the respondent confirmed that they wished to proceed with the matter today and no application for an adjournment was before me.
13. The background to this hearing is set out in some detail by EJ Davies in the summary to her CMO of 28 June 2018 sent to the parties on 1 July 2019.
14. The claimant worked for R1 (Coleg Gwent) from 1 September 2001 to 1 September 2018. The claimant was offered employment by (Merthyr Tydfil College) R2 in June 2018. The claimant resigned from R1 by email of 2 July 2018, whilst on suspension pending disciplinary investigation by R1. A reference was provided by R1 to R2 on 11 July 2018 and R2 withdrew its offer of employment that same day. The claimant sought to retract his resignation from R1 by email of 18 July 2018. The claimant asserts that he was subjected to bullying and harassment over an extended period of time, in particular by his line manager Catherine Moffat culminating in the instigation of a disciplinary investigation in June 2018. The claimant asserts that R1's reference to R2 amounts to a negligent misstatement.
15. ACAS early conciliation lasted from 20 November 2018 (Date A) to 18 December 2018 (Date B) with R1, Coleg Gwent. The claimant's effective date of termination was accepted by the claimant to be 1 September 2018 (as indicated on the ET3, the claimant having provided incorrect dates on his ET1) and therefore the limitation ordinarily expired on Friday 30 November 2018. By reason of the EC period extensions as the ordinary limitation expired during the period between Date A and Date B the new limitation period for the claimant to bring his claim against R1 expired on Friday 18 January 2019.
16. ACAS early conciliation lasted from 20 November 2018 to 5 December 2018 R2, Merthyr Tydfil.
17. On 26 November 2018, the claimant presented an ET1 claim form to the Tribunal, alleging unfair dismissal. Box 11 of the ET1 named Mr Rodney Chambers as the claimant's UCU representative. The claimant believed he had to present his claim within 3 months less one day of the EDT.

18. The claim was rejected by the tribunal by letter of 7 December 2018 as no early conciliation certificate number was provided and an exemption did not apply. Explanatory Notes was also included about applying for a reconsideration of the decision to reject
19. By email of 10 December 2018 the claimant provided an early conciliation certificate number in respect of R2. A copy of the email was on the tribunal file which demonstrated that the ACAS Certificate had been sent to the claimant's TU representative Mr Chambers, who in turn had forwarded it onto the claimant. Mr Chambers had been copied into the claimant's email to the tribunal enclose that ACAS certificate.
20. On 14 December 2018 the Tribunal wrote again to the claimant's representative, following a direction from EJ Sharp, regarding his claim against R2 and again asked for a copy of the ACAS Certificate for R1. The email confirmed to the claimant that this was '*required to process the claim against the first respondent.*
21. No ACAS EC number was received by the employment tribunal in respect of R1, Coleg Gwent and so a further email of 13 February 2019 was sent to the claimant's trade union representative on 8 February 2019 enclosing a further copy of the email of 14 December 2018 and asking for a response in writing by 15 February 2019. By this point in time, no claim had been issued in respect of Coleg Gwent.
22. On 13 February 2019 the claimant's representative provided an early conciliation certificate number in respect of R1. There is no reference in that email to any earlier email having been sent by or on behalf of the claimant.
23. Employment Judge Cadney directed that the claim should be accepted and served on 18 February 2019 under rule 13(4). This rule provides that the claimant is accepted on the date that the defect in provision of an early conciliation certificate number was rectified.
24. By email of 15 April 2019 the claimant informed the tribunal that his trade union representative was no longer acting and that he was acting in person.
25. The claimant refers to 'bullying, harassment and victimisation' on his ET1 claim form, which he completed without assistance. The claimant confirmed that he does not bring a complaint of discrimination and used these words with their ordinary meaning (not a meaning under the Equality Act 2010).
26. After considering the file and email receipt system at the tribunal, the hearing was re-adjudged and I confirmed that there was no evidence on the tribunal file of the 20 December 2018 email having been received and asked the claimant to present his case on the basis of not just the primary argument, that his case was in time as the ACAS Certificate number had been received by the tribunal before the limitation period, but also on the basis that he was asking me to extend time under s.111(20) ERA 1998 if I concluded that the claim was not presented within the time limits.

27. Submissions were made by the claimant as follows:
- (i) that he had sent the email in on 20 December 2018 to the tribunal after having received a copy earlier that day from Mr Chambers. He had not copied Mr Chambers into the email he had sent to the ET enclosing the EC certificate or providing the EC number.
  - (ii) He maintained he had not received an automated email from the ET confirming receipt and he asked me to consider that all times he has acted in good faith. The claimant had his email account on his mobile phone with him in tribunal, but despite being given an opportunity to find the email, he was unable to find and locate a copy, within his Sent items, of this email.
  - (iii) The claimant believed he had to present his claim within 3 months less one day of the EDT i.e. he believed he had to bring his claim by 30 November 2018. He was not aware that the Early Conciliation 'stopped the clock'.
  - (iv) With regard to Box 2.3 on the ET1 form, the claimant had ticked that he did not need an ACAS certificate as his employer had already been in touch with ACAS. The claimant told me that this had been ticked in error. On 26 November 2018, the claimant presented an ET1 claim form to the Tribunal, alleging unfair dismissal. Box 11 of the ET1 named Mr Rodney Chambers as the claimant's UCU representative.
28. He confirmed to me that he was a UCU member but that they did not represent him and had no advice from them or solicitors representing them. he did not find his TU helpful. He had been to see a solicitor privately but that their service was outside the scope of his financial means.
29. He told me that he believed that when he had provided the information to the ET on 20 December 2018, he had actioned everything needed for the Tribunal to process his claim. He did not tell Mr Chambers he had sent the ACAS number to the ET.
30. When asked why he did not query with the tribunal why there was, as a result, no progress to his claim after sending in the ACAS number, he initially told me that he had emailed the ET asking about the delay but when I provided the claimant with an opportunity to locate on his phone the date that he had sent such an email as I could not locate such an email from him on the tribunal file, he changed his position and confirmed that he did not raise a concern at the time. He could not explain why not.
31. When I considered submissions by Mr Blitz on behalf of the Respondent, it became clear that we would need to hear evidence from the claimant, despite the written statements not dealing with this point.

32. I therefore allowed further oral evidence from the claimant and Mr Chambers in relation, in particular to the email of 20 December 2018 and Mr Blitz was provided with the opportunity to cross examine both. The claimant was also provided with the opportunity to clarify issues arising out of his cross-examination.

### **Findings**

33. The claim form ET1 submitted on 26 November 2018 was rejected by the tribunal as it neither contained an EC Number for the claim against Coleg Gwent nor did any of the exemptions apply.
34. The claimant had ticked at Box 2.3 that he did not have an EC number as his employer had been in touch with ACAS. He had done so not knowing this to be true. Likewise, he had ticked that he was seeking Interim relief against R2 as he needed to complete the form to be able to submit the claim by 30 November, which was the date that he mistakenly believed marked the limitation date.
35. With regard to the email of 20 December 2018, I find that this email was not received by the ET on 20 December 2018 or indeed at any time. The first and only time that the ET received an ACAC EC number in respect of the claim against Coleg Gwent was on 13 February 2019, and that is the date that the claim against Coleg Gwent was accepted by this ET.
36. With regard to whether the claimant sent the email of 20 December 2018, the following findings are relevant:
37. The claimant :
- (i) could not produce an automated receipt;
  - (ii) could not locate a copy of the item in his Sent box of his email account;
  - (iii) Accepts that there was no server error.
38. The claim was issued on 19 March 2019 and on 16 April 2019, the present R1 submitted their ET3. At para 8 of the Grounds of Resistance the respondents refer to the claimant not having provided the EC number until 13 February 2019. This was sent to the claimant. No issue was raised by the claimant at this point that he relied on an earlier email sent on 20 December 2018.
39. A preliminary hearing was listed on 28 June 2019 before EJ Sian Davies. Thereafter she sent out a CMO in which she set out a summary of matters discussed which made no reference to the claimant alleging that he had sent the EC number in December, but references the claim number sent in on 13 Feb 2019.

40. No issue was raised by the claimant at that hearing that he relied on an earlier email sent on 20 December 2018. It is on that basis that she lists this hearing before me today.
41. The written witness statements, provided by the claimant in relation to the application before me today, contain no reference to an email being sent to the ET on 20 December 2018.
42. The claimant today cannot now locate a copy of the email in his Sent item in his email account.
43. I found that at no time, prior to this hearing today, has the claimant alleged that he submitted the EC number to the ET before the 13 Feb 2019.
44. The claimant told an untruth to Tracey Woods of Merthyr College in his email on 21 June 2018, as to why he was rejecting their job offer. I accepted that this was, in this instance to save embarrassment but it was accepted to be an untruth by the claimant.
45. I make no findings on the detail of the allegations brought against the claimant in relation to disciplinary investigation brought by Coleg Gwent, although it is accepted, and I found, that the claimant had admitted certain of the allegations against him.

### **The Law**

46. Rule 13(4) ET Rules provide that a claim is accepted on the date that the defect in provision of an early conciliation certificate number is rectified.
47. A tribunal may only extend time for presenting a claim where it is satisfied that:
  - a. it was not reasonably practicable for complaint to be presented in time
  - b. The claim was nevertheless presented 'within such further period as the tribunal considers reasonable'.
48. When a claimant tries to excuse late presentation of his or her ET1 claim form on the ground that it was not reasonably practicable to present the claim within the time limit, three general rules apply:
  - a. S.111(2)(b) ERA (and its equivalents in other applicable legislation) should be given a 'liberal construction in favour of the employee' — **Dedman v British Building and Engineering Appliances Ltd**1974 ICR 53, CA
  - b. What is reasonably practicable is a question of fact and thus a matter for the tribunal to decide. *Practical common sense is the keynote and legalistic footnotes may have no better result than to introduce a*

*lawyer's complications into what should be a layman's pristine province.*

- c. The onus of proving that presentation in time was not reasonably practicable rests on the claimant. *'That imposes a duty upon him to show precisely why it was that he did not present his complaint'* — **Porter v Bandridge Ltd** 1978ICR 943, CA. Accordingly, if the claimant fails to argue that it was not reasonably practicable to present the claim in time, the tribunal will find that it was reasonably practicable — **Sterling v United Learning Trust** EAT 0439/14.
34. Even if a claimant satisfies a tribunal that presentation in time was not reasonably practicable, that does not automatically decide the issue in his or her favour. The tribunal must then go on to decide whether the claim was presented 'within such further period as the tribunal considers reasonable'. Thus, while it may not have been reasonably practicable to present a claim within the three-month time limit, if the claimant delays a further three months a tribunal is likely to find the additional delay unreasonable and decide that it has no jurisdiction to hear the claim
  35. Case are so different and depend so much on their particular circumstances but the CA in **Palmer and anor v Southend-on-Sea Borough Council** 1984 ICR 372, CA, the Court of Appeal conducted a general review of the authorities and concluded that 'reasonably practicable' does not mean reasonable, which would be too favourable to employees, and does not mean physically possible, which would be too favourable to employers, but means something like 'reasonably feasible'
  36. Lady Smith in **Asda Stores Ltd v Kauser** EAT0165/07 explained it in the following words: 'the relevant test is not simply a matter of looking at what was possible but to ask whether, on the facts of the case as found, it was reasonable to expect that which was possible to have been done'.
  37. CA in **Marks & Spencer plc v Williams-Ryan** [2005] EWCA Civ 470 also set out a number of legal principles distilled from a review of case law :
    - a. s.111(2) ERA should be given a liberal interpretation in favour of the employee
    - b. Regard should be had to what, if anything, the employee knew about the right to complain to a tribunal and the time limit for doing so;
    - c. Regard should be had to what knowledge the employee should have had, had they acted reasonably in the circumstances

## **Conclusions**

49. Having found that the tribunal did not receive the email of 20 December 2018, the claim was presented to and accepted by the ET on 13 February 2019 pursuant to Rule 13(4) ET Rules which provide that a claim is accepted on the



date that the defect in provision of an early conciliation certificate number is rectified.

50. The claim is therefore out of time .
51. This tribunal may only extend time for presenting a claim where it is satisfied that:
  - a. it was not reasonably practicable for complaint to be presented in time
  - b. The claim was nevertheless presented 'within such further period as the tribunal considers reasonable'
52. In essence the claimant asks me today to find that the claim is in time as the document at C11 is a copy of the email that he sent into the tribunal on 20 December.
53. In this case, there are no arguments regarding ignorance of the law that would impact on my determination and no arguments that union representation was at fault.
54. Rather it is the case that the claimant knew that he had to provide the EC number and believed he had done so. Even if that email has not been received, on that belief basis, it was then not reasonably practicable for him to actually comply with the rules but that when he was made further aware that the ET was awaiting the EC number he nevertheless presented the EC number within such further period as the tribunal considers reasonable.
55. As I have been reminded the onus of proving that presentation in time was not reasonably practicable rests on the claimant.
56. I am not satisfied that the claimant has discharged that burden.
57. I do not consider that in all the circumstances of the case and the evidence that is available on the tribunal file and that has been presented to me today that the claimant has satisfied me on balance of probabilities that he has sent that email.
58. Whilst the production of a copy email is usually acceptable I am not satisfied that has been sufficient to discharge that evidential burden in light of the lack of evidence from his email account and failure to raise this at any point in these proceedings, whether at the Case Management Preliminary Hearing in June 2019 or in his witness statements for the hearing today.
59. As this was the only basis on which it was argued or could be said that it was not reasonably practicable to bring the complaint in time, I conclude that the claimant's claims for unfair dismissal were brought out of time, time is not extended and the claims are dismissed for lack of jurisdiction.

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Employment Judge Brace  
Dated: 16 December 2019

REASONS SENT TO THE PARTIES ON  
.....21 December 2019.....

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FOR THE SECRETARY OF  
EMPLOYMENT TRIBUNALS