EMPLOYMENT TRIBUNALS

Claimant		***Respondent***
Mr M Ridsdill Smith	**AND**	CGS-CIMB Securities (UK) Ltd

OPEN PRELIMINARY HEARING

Heard at: London Central **On**: 10 January 2020

Before: Employment Judge Nicolle

Representation
For the Claimant: Mr A Watson, of Counsel
For the Respondent: Ms I Buchanan, of Counsel

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the claim of unfair dismissal.

2. The Tribunal does have jurisdiction to hear the claim for age discrimination.

3. The Tribunal grants leave for an amendment to the Grounds of Complaint to enable the inclusion of claims for indirect age discrimination and post-employment victimisation.

REASONS

The Hearing

1. The hearing was originally listed for a 2-hour case management hearing (CPH). In advance of the CPH solicitors for both parties wrote to the Tribunal requesting that the CPH should be converted to an open preliminary hearing (OPH) so that the Respondent's applications for the claims to be struck out as a result of the Tribunal not having jurisdiction to hear them could be considered.

2. I explained to the parties that the normal requirement for the holding of an OPH involves at least 14 days' notice being given to the parties in accordance with Rule 54. Any application to determine any preliminary issue and/or to consider whether any part of the claim should be struck out under Rule 37 would fall within the scope of an OPH in accordance with Rule 53(1)(b) and (c).

3. Counsel for both parties confirmed that they were happy for the CPH to be converted to an OPH notwithstanding the normal 14 days' notice not being given. I therefore exercised my discretion in accordance with Rule 5 to shorten the time specified in the Rules.

4. I agreed to extend the scheduled 2 hours to 3 hours to allow time to hear submissions on the issues but advised the parties that given the limited time available I would be likely to reserve my decision. The parties agreed to this.

The Issues

5. The parties agreed that the last date for serving of the ET1 to the Tribunal was 19 July 2019. The Claim was not validly presented until 27 July 2019.

6. Whether it was reasonably practicable for the Claimant's unfair dismissal claim to be presented in time and, if it was not, whether the claim was presented within a further period of time which was reasonable.

7. Whether it is just and equitable to extend the time limit for the Claimant to bring his victimisation and age discrimination claims to 27 July 2019.

8. Whether the Claimant's application to amend to add claims of:

- indirect age discrimination in relation to his dismissal; and
- post-termination victimisation should be allowed.

Findings of Fact

The Claimant

9. The Claimant was employed as Head of Sales Trading in the period from 9 July 2012 until his dismissal on the grounds of redundancy on 4 April 2019.

The Respondent

10. The Respondent is the UK arm of CGS-CIMB Securities International Pte Ltd, an integrated financial service provider in Asia.

The Claim

11. In a Claim Form presented on 27 July 2019 the Claimant claims unfair dismissal and direct discrimination on account of age. He seeks to amend the

Claim Form to include further allegations of indirect age discrimination and post-employment victimisation.

Relevant Chronology

12. The Claimant contends that the action of Rohan White, the Head of Office (Mr White) in suspending him on 8 March 2019, whilst his grievance was extant, constituted an act of victimisation.

13. The Claimant undertook a period of ACAS early conciliation between 1 May and 17 May 2019.

14. The Respondent contends that 23 June 2019 was the last day to issue a victimisation claim.

15. The Claimant instructed Setfords Solicitors to act for him in an employment tribunal claim against the Respondent. The solicitor with responsibility for the conduct of the matter was Justin Murray (Mr Murray).

16. Mr Murray completed an ET1 and Grounds of Complaint and sent this by email to the London Central Employment Tribunal ("London Central") at Londoncentralet@Justice.gov.uk on 11 July 2019. In his witness statement (which was taken as read and Mr Murray was not called to the witness stand) he explained that he had intended to upload the information to the online ET form for online serving as he normally would, and then upload the RTF version of the Details of Claim, but as a result of a momentary lapse of concentration he formed the view that he could just send both by email to the Employment Tribunal and thereby save time. He explained that he was experiencing an extremely busy period and that this would free up an hour or two of time.

17. Mr Murray received an automated response from the London Central email address at 18:32 on 11 July 2019. Relevant sections of that email are:

> "Thank you for your email which has been received by the London Central Employment Tribunal.
>
> 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"

18. Mr Murray says that he regarded the email as acknowledging a valid acceptance of the ET1 and Details of Claim.

19. At 15:47 on 19 July 2019 Mr Murray sent the ET1 and Details of Claim to the Respondent's representative on a without prejudice basis. This coincided with the agreed last date for presenting of the ET1 to the Tribunal.

20. Under cover of an email from the London Central at 11:36am on Saturday 27 July 2019, a letter dated 29 July 2019, was sent to Mr Murray.

21. The Tribunal's letter dated 29 July 2019 advised Mr Murray that the ET1 submitted by post to this office is rejected because a claim must be presented in accordance with any practice direction made under Regulation 11 of the Rules. I find that the reference in the Tribunal's letter to "submitted by post" is erroneous as it is acknowledged that the attempted presentation of the Claim by Mr Murray on 11 July 2019 was by email. The letter went on to set out the valid means of filing a claim which are online, by post to the Employment Tribunal Central Office in Leicester or in person to an Employment Tribunal Office listed in the schedule to the Practice Direction. The letter included a link to the Presidential Direction dated 14 December 2016.

22. Mr Murray was obviously concerned on receipt of the Tribunal's email. Given that it was a Saturday he then moved extremely quickly to "re-present" the Claim online that day and he then sent a confirmatory email to the London Central email address at 19:40 on 27 July 2019. The Respondent does not accept that this constituted re-presentation of a rejected claim but rather the filing of a claim not previously presented.

23. The link to the Presidential Practice Direction attached to the Tribunal's letter of 29 July 2019 is not the most recent version. The most recent version of the Practice Direction is dated 28 November 2018. However, I do not consider this to be material given that the means of valid presentation of a Claim whether online, by post or by hand remain the same between the most recent versions of the Practice Direction.

24. At 19:30 on 27 July 2019 Mr Murray was sent a no reply email from the Tribunal confirming receipt of the Claim.

25. Also on 27 July 2019 Mr Murray sent a detailed four-page email to the Tribunal explaining the chronology of events and highlighting the confusion which he says had arisen as a result of what he construed as the misleading and unhelpful automated responses provided by the Tribunal subsequent to his original email attaching the Claim Form. He also referred to the erroneous reference to an out of date version of the Practice Direction referred to in the letter dated 29 July 2019. It is not necessary for me to set out in more detail arguments advanced in this email regarding the acceptance of the attempted presentation of the Claim and/or an extension of time for a presentation of the Claim as they are addressed elsewhere in this decision.

26. Setfords sent a letter to the Tribunal dated 6 December 2019 containing an application to amend the Claim Form to include indirect age discrimination and post-termination victimisation.

27. Setfords sent a five-page letter to the Central Office of the Employment Tribunals in Leicester dated 6 January 2020. Again, there is no need for me to refer to matters in this letter as it represented a general critique of the Tribunal's automated emails and what Setfords contend gave rise to confusion as to the validity, or otherwise, of the attempted presentation of the Claim by email on 11 July 2019.

The Law

28. It was agreed by the parties that different tests apply for the exercise of discretion to extend time under the Employment Rights Act 1996 (the "ERA") and the Equality Act 2010 (the "EqA").

29. The test under s.111 ERA has two stages:

- first, was it reasonably practicable to present the claim within the primary time limit?

- secondly, if yes, was the claim presented in such further period as is reasonable?

30. The test under s.123 of the EqA is more generous in that it enables a tribunal to exercise its discretion where it is "just and equitable" to do so.

31. Rule 8 provides that a claim will be started by presentation of a claim form in accordance with any Practice Direction supplementing the Rule. Rule 85(2) reiterates that a claim can "only" be presented in accordance with the relevant Practice Direction. The relevant Practice Direction dated 28 November 2018 does not permit presentation by email (see s5 Presentation of Claims).

Unfair dismissal

32. I was referred to a bundle of relevant authorities. Most of the cases are well known.

33. The onus of proving that presentation in time was not reasonably practicable rests on the claimant.

34. I was referred to the judgment of Lord Denning in R J Dedman v British Building and Engineering Appliances Ltd [1973] IRLR 379. This includes the following:

> "If a man engages skilled advisors to act for him – and they mistake the time limit and present it too late – he is out. His remedy is against them".

He went on to state:

> "If he was at fault, or if his advisers were at fault, he must take the consequences. By exercising reasonable diligence, the complaint could and should have been presented in time".

35. The prevailing test is that set out by Brandon LJ in Wall's Meat Co Ltd v Khan [1979] ICR 52, 60-61. This test looks to the objective state of mind of the claimant: is there some impediment which reasonably prevents, or interferes with, or inhibits, presenting the claim on time? Brandon LJ refers to mental impediments as being the state of mind of the claimant "in the form of ignorance of, or mistaken belief with regard to, essential matter." The ignorance or mistaken

belief must itself be reasonable, and it will not be reasonable if it arises from "the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

36. The Court of Appeal affirmed the Dedman principle in Marks and Spencer plc v Williams-Ryan 2005 ICR 1293, CA. Conducting a thorough review of the relevant authorities, Lord Phillips (then Master of the Rolls) concluded that the comments in Riley and Sen were obiter and that Dedman remained good law. In his view, the correct proposition of law derived from Dedman is that where the employee has retained a solicitor to act for him or her and fails to meet the time limit because of the solicitor's negligence, the solicitor's fault will defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the tribunal.

37. The Claimant argued that the focus of the Tribunal's attention must be on whether it was reasonably practicable to present the "second claim" on time: Adams v British Telecommunications plc [2017] ICR 382 (Simler P). The circumstances of the first claim are relevant insofar as they shed light on the answer to this question, but the focus must be on the second claim.

38. In both Adams, and the subsequent case of Baisley v South Lanarkshire Council [2017] ICR 365 (Lady Wise), the EAT has found (or in Baisley, strongly suggested) that it was not reasonably practicable to present the second claim on time in the context of errors made in the presentation of the first claim form.

39. In *Adams*, the claimant had instructed solicitors and presented the claim form in person. The ACAS early conciliation number had been entered incorrectly on the form and the claim was rejected for that reason. The claimant was notified after the primary time limit had expired. Simler P, redeciding the case on appeal, held that it was not reasonably practicable for the claimant to bring the claim on time because, in essence, she had no reason to believe the first claim was defective until she was told this by the tribunal, and it was a genuine and unintentional mistake made by her solicitors.

40. In *Baisley*, the claimant submitted his claim with a fee remission application which was rejected. His solicitors lodged an appeal against the rejection of the remission application, but it did not reach the tribunal. The claim was rejected and by the time they were informed, the primary time limit had expired. The claimant sought an extension to pay the fee and presented a second claim. The ET refused to extend time to present the second claim. The EAT noted that the claimant and his advisers had *"wrongly but genuinely understood"* that the appeal had been lodged on time and that furthermore had brought the second claim promptly. Lady Wise commented that it was *"difficult to see"* the justification for rejecting the second claim.

41. In accordance with Software Box v Gannon [2015] 6 WLUK 277; [2016] I.C.R. 148; EAT – the focus is on this "second" claim but the events surrounding the failure to deliver the first claim are relevant.

Extension of time for the discrimination claim

42. The approach taken to the just and equitable test under s.123 EqA is different to the approach to s.111 ERA.

43. It is clear from the case law that an employment tribunal's discretion to extend time in discrimination cases is wider than the discretion available in unfair dismissal cases. Therefore, whereas incorrect advice by a solicitor is unlikely to save a late tribunal claim in an unfair dismissal case, the same is not necessarily true when the claim is one of discrimination — *Hawkins v Ball and anor 1996 IRLR 258, EAT* and *British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT.*

44. The case law on the just and equitable test makes clear that a claimant *"cannot be held responsible for the failings of his solicitors"*: *Virdi v Commissioner of Police for the Metropolis* [2007] IRLR 24.

45. The checklist of factors in s.33 of the Limitation Act 1980 is a useful guide of factors likely to be relevant, but a tribunal will not make an error of law by failing to consider the matters listed in s.33 provided that no materially relevant consideration is left out of account: *Neary v Governing Body of St Albans Girls' School* [2010] ICR 473. Section 33 requires the court to take into account all the circumstances of the case, and in particular the factors set out at s.33(3). Those factors which are relevant to the Claim are:

a. the length of, and reasons for, the delay by the Claimant;
b. the extent to which the cogency of the evidence is likely to be affected by the delay;
c. the promptness with which the Claimant acted once he knew of the facts giving rise to the cause of action; and
d. the steps taken by the Claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

46. The Court of Appeal in *Southwark London Borough Council v Afolabi 2003 ICR 800, CA*, confirmed that, while the checklist in S.33 of the Limitation Act 1980 provides a useful guide for tribunals, it need not be adhered to slavishly.

Conclusions

47. The parties are agreed regarding the relevant time limits for the presentation of the various claims sought to be pursued by the Claimant. Whilst the Claimant argued that the Claim as sent by email on 11 July 2019, and the Tribunal's letter of 29 July 2019 sent under cover of an email of 27 July 2019 represented, the rejection of a "presented claim" and that the Claim was then re-presented on 27 July 2019) I do not accept this analysis.

48. Rule 10 makes specific reference to the circumstances of rejection, for example, the absence of an early conciliation number and Under Rule 10 (2) that the rejection form should contain information about how to apply for a reconsideration. Rule 10 does not refer to the late presentation of a claim. I find

that the Claim was not presented on 11 July 2019 as email is not a valid means of presenting a claim and therefore there was no presented claim. Therefore, when the Claim was validly presented on 27 July 2019 it was not a second claim but rather the late presentation of a Claim not previously presented. A presented claim can be rejected, and the rejection reconsidered, but this Claim was never presented.

49. I find that there is no basis for a distinction between the so-called "first" and "second" claims given my finding that the purported first claim was never presented and therefore there is only one claim which I need to consider which was that presented online on 27 July 2019. Whilst the circumstances pertaining to the purported presentation of the claim under cover of an email on 11 July 2019 are relevant to the question of the reasonable practicability of the claim being presented within the requisite statutory time period I find that there was only one claim and not two claims as contended on behalf of the Claimant.

Unfair dismissal

50. The sole issue I need to determine is whether it was reasonably practicable for the Claim to be presented within the applicable time limit given that when presented by a valid means of service on 27 July 2019 it was eight days out of time.

51. I find it to be incontrovertible that the sending of a Claim by email as at 11 July 2019 did not represent a valid means of service. I then need to consider Mr Murray's argument that he in effect relied on misleading advice from the Tribunal's automated response to his attempted presentation of the Claim by email. I find that this is not a case where the Claimant's legal adviser was misled by advice of the Tribunal. Looking at the Tribunal's automated email of 18:32 on 11 July 2019 it merely acknowledges receipt of an email and does not state that there has been the acceptance of a Claim. Whilst the email at paragraph 3 contains the statement that "we aim to deal with new Claims within 3-5 working days" this is not the same as providing confirmation that a Claim has been validly presented and the sentence after says the claim needs to be checked before acceptance.

52. I find it unlikely that Mr Murray, or any legal representative, would read and rely on, the body of what is self-evidently an automated response. In making this finding I also consider it relevant that Mr Murray in his witness statement acknowledges that his sending of the ET1 to the Tribunal by email on 11 July 2019 represented a momentary lapse of concentration rather than what he considered represented a valid means of presenting the claim.

53. Mr Murray's own evidence is that he was aware of the valid means of presentation, but as a result of what he described as a "momentary lapse of concentration" and a wish to save time used an invalid means of attempted service.

54. I also do not accept that the automated reply from the Tribunal on 11 July 2019 referring to a typical response time of 3-5 days, but not until 27 July 2019 (16 days later) was notification sent to Mr Murray rejecting the attempted presentation of the Claim, to be a factor making it not reasonably practicable to submit the Claim in time. I reach this finding for the following reasons:

- it was not reasonable of a professional legal adviser to place such reliance on the Tribunal's automated email even if it had been read which I consider unlikely;

- it was coincidental that the 3-5 day stated time period for a response would still theoretically have provided time for valid presentation of the Claim and it could equally have been the case that the attempted erroneous presentation of the Claim by email was in a period of 3-5 days of the time limit; and

- in his evidence Mr Murray was fully aware of the valid means of presentation.

55. I also do not find that references to some inconsistencies and/or anachronisms in the Tribunal correspondence, some of which potentially relate to the now repealed fee regime, are material factors. The valid means of presentation are well known and have been unchanged through the most recent versions of the applicable Practice Direction. Therefore, the attachment of an out of date link to the Practice Direction in the Tribunal's letter dated 29 July 2019 was not a material factor. In any event the Claimant was already out of time at this date.

56. Attempted delivery on 11 July 2019 was not in accordance with the Practice Direction and so it was not delivered.

> "Acceptance" and "presenting" a claim comes after it has been correctly delivered.

57. Was the Claim filed online on 27 July "delivered"? I find it was.

58. Was it out of time? I find it was.

59. Is this a mistake for which the Tribunal is responsible? I find it was not - see Rule 85(3) – the automated response was about the process following presentation. It was clear that the ET1 had not been accepted, the response says that a claim has to be checked before it is accepted – this is not the same as delivery. Also, Mr Murray was not at the time reassured by the response as he admits that emailing the first ET1 was a mistake and that he knew what he should have done.

60. I do not accept that this case is analogous with Adams and Baisley where the EAT has found (or in Baisley, strongly suggested) that it was not reasonably practicable to present the second claim on time in the context of errors made in the presentation of the first claim form. I find that this is not a case where Mr

Murray relied on incorrect advice from the Tribunal but rather one where he made a genuine mistake.

61. I therefore find that it was reasonably practicable for the unfair dismissal claim to be presented in time. Whilst I acknowledge that this has the unfortunate consequence for the Claimant that his unfair dismissal claim cannot be heard this is not a case where it would be appropriate for the Tribunal to exercise its discretion to extend time.

62. Whilst the circumstances for the Claimant in relation to his unfair dismissal claim are self-evidently unfortunate, I do not find that on the facts that it is appropriate to extend jurisdiction on the basis that it was not reasonably practicable to present the unfair dismissal claim within the relevant time limit. In reaching this finding I take into account the candid evidence of Mr Murray that the failure to present the claim in accordance with the prescribed means of doing so, as set out in the Practice Direction, arose as a result of a "momentary lapse of concentration".

63. Whilst it is therefore not relevant for me to consider whether the presentation of the claim by Mr Murray on 27 July 2019 was presented within a further period of time which was reasonable if I had needed to make this decision I would have found that it was. It is very apparent that on realising the mistake which had occurred that Mr Murray acted with all possible alacrity and diligence to rectify the situation.

Age discrimination

64. The parties acknowledged that a delay caused by an error on the part of a Claimant's professional advisor is not in itself a bar to an extension of time given that it is a "just and equitable" test which applies under the EqA.

65. In determining whether the Tribunal's discretion should be exercised it is relevant for me to take into account the following factors:

- the prospective merits of the Claim; and
- the balance of prejudice between the Claimant and the Respondent.

66. I reviewed the pleadings. I do not accept the Respondent's contention that the Claim for age discrimination is wholly unmeritorious. I also do not accept that the exercise of the Tribunal's discretion to allow the Claim to proceed would result in the Respondent incurring disproportionate time and expense given that the time and expense would have been that incurred had the Claim been validly presented. I find that there are at least arguable issues to be considered by the Tribunal in the Claim of direct age discrimination given the arguments regarding the grounds for the "deletion" of the Claimant's post, evidence that a younger and cheaper replacement was subsequently recruited and arguments regarding the financial performance of the Claimant and the Sales Team. This would not have been a case where the Tribunal would have considered the striking out of the

Claim of direct age discrimination. I therefore find that it is appropriate for the Tribunal's discretion to be exercised to allow the claim for direct age discrimination to proceed.

Victimisation claim

67. Whilst it was contended by the Respondent that the victimisation complaint was 34 and not 8 days out of time when the Claim Form was validly presented on 27 July 2019 I find that this Claim should be permitted to proceed on the same just and equitable basis under the EqA. I find that it is at least arguable that victimisation represented an ongoing act culminating in the Claimant's dismissal on the grounds of redundancy with effect from 4 April 2019. I therefore determine that any argument regarding the victimisation claim being out of time as not forming a part of a continuing course of conduct should be determined at the Full Merits Hearing.

Amendment Applications

Indirect age discrimination

68. In *Selkent Bus Co v Moore* [1996] ICR 836, the EAT held that "the paramount considerations are the relative injustice and hardship involved in refusing or granting an amendment."

69. In *Abercrombie v Aga Rangemaster Ltd* [2014] ICR 209, the Court of Appeal held that in cases which arguable raise new causes of action, the correct approach is "to focus not on questions of formal classification but on the extent to which the new pleading is likely to involve substantially different areas of inquiry than the old: the greater the difference between the factual and legal issues raised by the new claim and by the old, the less likely it is that it will be permitted."

70. The Respondent's position is that the application to amend the Claim Form to include a claim for indirect age discrimination is not a mere "relabelling" exercise but involves a fundamentally new claim involving new evidence. Further, it is contended that the granting of this amendment would involve the Respondent in substantial additional time and cost and lengthen the hearing

71. I do not accept the Respondent's arguments in this respect. I consider that the amendment is relatively limited and whilst it arguably goes beyond mere "relabelling" the facts upon which a Claim of indirect age discrimination is based are in my view set out in the original Claim Form. I refer specifically to s.30 where reference is made to the Respondent's wish to recruit a replacement at a salary of approximately £40,000 and at s.30(c) to this in effect involving someone in the 20-29 age group. I therefore grant leave for this amendment.

Post-termination victimisation

72. The EAT in *Prakash v Wolverhampton City Council* UKEAT/0140/06 held that a claimant can amend their claim to include causes of action not available when the claim was originally issued.

73. I also grant leave for this amendment. In any event this claim would still be in time and it would be inconsistent with the overriding objective for the Claimant to be required to initiate a further process of ACAS early conciliation and then serve a further Claim Form. In accordance with the principles set out in Prakash I find it appropriate for this amendment to be accepted.

Future conduct of the Claim

74. It was agreed that the Tribunal should schedule a telephone directions hearing (TPH) within a month of the Tribunal's decision being sent to the parties. This will be notified to the parties. It was also agreed that the originally listed hearing date of 5 days commencing 7 April 2020 should be taken out of the list and the case relisted at the proposed TPH.

Employment Judge Nicolle

Dated: **3 February 2020**

Sent to the parties on 04/02/2020

For the Tribunal Office