



EMPLOYMENT TRIBUNALS

Claimant: Mrs V Dunne

Respondent: Wilko Retail Limited

Heard at: Nottingham

On: 25 February 2020

Before: Employment Judge Batten (sitting alone)

Representation:

Claimant: In person

Respondent: Ms L Gould of Counsel

JUDGMENT having been sent to the parties on 27 February 2020 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:

JUDGMENT

The judgment of the Tribunal is that: -

The claimant's claim was not presented to the Tribunal in accordance with the provisions of section 111 of the Employment Rights Act 1996 in circumstances where the Tribunal was satisfied that it was reasonably practicable to present the claim before the end of the period of three months. Accordingly, the claim is dismissed for lack of jurisdiction.

REASONS

Background and issues

1. The claimant presented complaints of unfair dismissal and breach of contract. The case was listed for final hearing on 25 February 2020. The Tribunal reviewed the file papers on the afternoon of 24 February 2020 and, at that point, it was noticed that the claim had been presented 'out of time' in light of the date of dismissal, the period of early conciliation and the date of presentation to the Tribunal offices.

2. At the start of the hearing, the Employment Judge addressed the parties on the issue of jurisdiction that arose. The question of whether a claim has been submitted within the statutory time limit goes to the issue of whether the Tribunal has jurisdiction to hear the claim. A Tribunal cannot deal with a claim that has been submitted out of time unless the claim falls within the relevant statutory provision for an extension of time. Therefore, the Tribunal needed to deal first with the time issue before it could proceed to hear evidence on the claim itself.
3. The Employment Judge took time to explain to the parties in detail the relevant dates and why she considered that the claim was out of time and the Employment Judge set out the legal tests which applied and supplied the parties with copies of the relevant caselaw. The parties were then given time to consider the position and what had been explained to them. Both parties agreed to proceed to deal with the time point at the start of the hearing and were invited to make submissions to the Tribunal on that issue.

The applicable law

4. The Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013, schedule 1, rule 10(1) stipulates that the Tribunal shall reject a claim if it does not contain certain minimum information. Rule 10(1), subsection (c)(i), provides that one of those pieces of essential information is an early conciliation number. There is no discretion to overlook a minor error in the early conciliation certificate number in a claim form and the absence of an early conciliation certificate number is not a minor error.
5. Rule 10(2) states that a claim form which does not contain the required minimum information shall be returned to the claimant with a notice of rejection explaining why it has been rejected and giving information on how to apply for a reconsideration of the rejection.
6. Rule 13(2) gives a claimant 14 days in which to apply for a reconsideration of the rejection of a claim. If an Employment Judge then decides that the original rejection was correct but that the defect has since been rectified, the claim shall be treated as validly presented on the date that the defect was rectified, pursuant to rule 13(4).
7. In *Sterling v United Learning Trust UKEAT/0439/14* President Langstaff described it as implicit that the early conciliation number given when a claim is presented is an accurate number. In that case, a Tribunal had been obliged to reject a claim where the early conciliation number written on the claim form had not been accurate. The claim was rejected because the claimant had missed the last forward-slash and final two digits of the early conciliation certificate number when transcribing the number onto the claim form. Although the tribunal has a discretion to overlook certain kinds of 'minor errors' the Employment Appeal Tribunal confirmed that there is no discretion under rule 10 to overlook minor errors in the early conciliation number on a claim form. That discrepancy was criticised by Simler P, in the case of *Adams v BT plc UKEAT/0342/15*, in which the Judge opined that the operation of rule 10(4) was “*hard to justify as a matter of principle*” and was something that the rules perhaps should be

amended to take account of. No such amendment to the rules has however been made.

8. Section 111(2)(b) of the Employment Rights Act 1996 contains provisions under which the time limit for presentation of a claim of unfair dismissal may be extended. Those provisions are mirrored in section 7(c) of the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 which governs claims of breach of contract brought in the Employment Tribunal. Ordinarily, a claim has to be presented before the end of the period of 3 months beginning with the effective date of termination of employment. If not, the Tribunal must be satisfied, first, that it was not reasonably practicable for the complaint to be presented before the end of the period of 3 months and if so, the Tribunal must also be satisfied that the out of time claim was brought within such further period as the Tribunal considers reasonable.

The facts

9. On 11 June 2019, the claimant was dismissed by the respondent. The primary limitation for submitting a claim of unfair dismissal and breach of contract, by first going through the ACAS early conciliation process, was therefore 10 September 2019, being the end of the relevant 3 months period in which to present a claim.
10. On 11 July 2019, the claimant started ACAS early conciliation. Day 'A' on the early conciliation certificate is recorded as 11 July 2019 and day 'B', when ACAS produced a certificate to confirm the end of early conciliation, is recorded as 21 August 2019. Early conciliation therefore lasted for 41 days. The effect of early conciliation is to stop the clock on the statutory time period and so, in effect, to extend the period in which a claim shall be presented to the Tribunal offices. The extension is calculated by adding on to the primary limitation period the 41 days of early conciliation. In this case, that means that the extended limitation date was 21 October 2019.
11. The claimant told the Tribunal that she had the support of her trade union and their solicitors for a period of time and that she had been advised by them that the time limit for submitting her claim to the Tribunal was 20 October 2019. That is why, on 17 October 2019, the claimant proceeded to submit an online claim form. However, she did not have the correct ACAS early conciliation certificate number because it was short of the last 3 characters, being the forward-slash and the last two numbers. The claimant found that she was unable to use the number that she did have in the online form because the system was telling her that it was not the correct number (presumably because it was 3 characters short). In an effort to get around this issue and submit the claim form online, the claimant ticked a box in section 2.3 of the online claim form to say that she did not have an early conciliation number, when in fact she did albeit an incomplete number. Then, in answer to the question about why she did not have an early conciliation number, the claimant ticked a box to suggest that "another person I am making a claim with has an early conciliation number" when that was not the correct position.
12. On 24 October 2019, having vetted the claim submitted, the Tribunal Service sent a notice to the claimant to confirm that her claim was rejected under rule 10(2) for lack of an early conciliation number. In response, that

same day, the claimant asked the Tribunal for a reconsideration of the rejection on grounds that the online system would not allow her to put in the early conciliation number that she had. She quoted the number, R518283/19. She also said that she had ticked the boxes in section 2.3 of the claim form incorrectly and she confirmed that nobody else was in fact making a claim with her.

13. On 28 October 2019, the Tribunal emailed the claimant to tell her that the early conciliation number which she had supplied was not complete. The following day, having contacted ACAS, the claimant supplied the correct and full early conciliation number to the Tribunal. The claim was then accepted after reconsideration of the rejection on the basis that the defect had been remedied. By operation of rule 13(4), the claim presentation date is the date on which the defect was remedied, which was 29 October 2019. In that event, the claim is out of time by 8 days.

Submissions

14. The claimant told the Tribunal that she had never seen the early conciliation certificate that was in the bundle prepared for the hearing and that she had been left to present her claim herself, when the trade union and its solicitors decided not to support her case. She said that she had spoken to ACAS and that they gave her the incorrect early conciliation number. The claimant also told the tribunal about a number of stressful and difficult things that had happened to her in the interim and which had affected her.
15. Counsel for the respondent made submissions to the effect that, if a matter is the fault of a trade union or their solicitors, then such mistakes vested in the claimant. The respondent acknowledged that the legal position and operation of the Tribunal's rules produced an exceedingly harsh result for the claimant. However, it was contended that the facts of the *Sterling* case mirrored this case almost exactly and therefore the Tribunal was bound to follow the case law. Counsel also contended that it had been reasonably practicable for the claimant to present her claim in time, because she had done so save for the defect in the early conciliation number.

Conclusions

16. The Tribunal has applied the relevant law to the facts to reach the following conclusions.
17. The claim was validly presented on 29 October 2019 and is therefore out of time. It had been rejected under the Tribunal rules. There is no discretion for the Tribunal to do otherwise than reject a claim where there is no early conciliation number in circumstances where an early conciliation number is required.
18. The Tribunal considered what was the reason why the claimant missed the applicable time limit. The claimant told the Tribunal that she had contacted ACAS when she could not get the online system to work and they gave her the early conciliation number which was short of the last 3 characters: the forward-slash and the numbers 8 and 6 on the end. The Tribunal was concerned at the suggestion that ACAS would make such a

fundamental error when communicating the full early conciliation number as required by the online claim system. That is especially so where a prospective claimant asks ACAS about the online Tribunal claim form system. The only early conciliation number which the online system accepts is the full number, hence the error messages that the claimant received. The claimant then sought to overcome the problem with the early conciliation number by misrepresenting the position in the online claim form, in order that the system would then accept her claim. The reason for the claim being out of time was therefore the failure of the claimant to record the early conciliation number accurately in the online form. Instead, she chose to tick certain boxes online and to make statements that did not represent the true position in an effort to get around the online messages which she received, warning her that the early conciliation number was not correct.

19. The Tribunal noted that the Claimant had assistance at the material time from her trade union and also from solicitors. Whilst the claimant said that she had not seen the early conciliation certificate, the Tribunal considered that somebody must have seen it because the claimant was advised that she must submit her claim by 20 October 2019 being almost (but not exactly) the correct extended limitation date. Such a date can only be calculated if a claimant, or their representative, knows the length of the period of early conciliation. 41 days is, in fact, an unusual period for early conciliation which ordinarily takes place over a period of a month. Therefore, the Tribunal concluded that the extended limitation deadline must have been calculated by somebody who had knowledge of the date(s) on the early conciliation certificate. In the circumstances, as the respondent submits, any fault on the part of an adviser is not something that the Tribunal can address.
20. In addition, the Tribunal was mindful of the fact that there was a period of almost 2 months between the issue by ACAS of the early conciliation on 21 August 2019, and 17 October 2019 when the claimant decided to present her claim, at almost the end of the limitation period. One of the perils of leaving things to the last minute is that, when things do not go to plan, there is little if any time to correct matters.
21. The Tribunal has also considered the issue of whether it was reasonably practicable for the claimant to submit the claim in time. Having considered the facts of and the decision in *Sterling*, and the dicta of Langstaff P, the Tribunal considered itself bound to find that, in the circumstances of this case, it was reasonably practicable for the claimant to submit her claim in time. The claimant knew of the time limit. She submitted her claim only a few days before the date of which she had been advised and she submitted her claim online and within the extended limitation period albeit that it was then rejected. Here the Tribunal noted that in the *Sterling* case the Employment Appeal Tribunal decided that an argument on reasonable practicability would be difficult because the claimant had actually submitted the claim in time but for the error. It was, as Langstaff P said, the claimant's responsibility to ensure that the right early conciliation number was used. That did not occur in *Sterling* and likewise did not occur in this case. The Tribunal has therefore found that it was ultimately the claimant's responsibility to sort out whatever information she needed in order to complete the online form correctly and so present her claim. She

had advice from her trade union and their solicitors. If they are at fault, then the claimant's remedy lies there.

22. In light of the above circumstances, the Tribunal concluded that it was reasonably practicable for the claimant to present her claim in time. An extension of time is not therefore available to the claimant even though the defect in the claim was corrected in a relatively short period of time. The Tribunal agrees with Counsel for the respondent, that the situation for the claimant is harsh. However, time cannot be extended and the claim must be dismissed for lack of jurisdiction.

Employment Judge Batten
Date: 31 March 2020

REASONS SENT TO THE PARTIES ON

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