



# EMPLOYMENT TRIBUNALS

**Claimant**

**Mr A Khan**

**v**

**Respondent**

**Kerry Foods Ltd**

**Heard at: Bury St Edmunds**

**On: 11 March 2020**

**Before: Employment Judge S King**

## **Appearances**

**For the Claimant: In person.**

**Assisted by an Interpreter: Ms A Ameer (Language: Urdu).**

**For the Respondent: Mr P Nainthy (Solicitor).**

## **JUDGMENT**

1. The claimant's claim for unfair dismissal is dismissed as the Tribunal does not have jurisdiction to hear the complaint.
2. Middlesex Law Chambers do pay the claimant the sum of £1,150 in wasted costs.

## **REASONS**

1. I heard evidence from the claimant. I also heard submissions from both the claimant and the respondent in connection with this matter.

The issues

2. The matter was listed for an open preliminary hearing following the hearing on 26 September 2019 before Employment Judge Lewis, the purpose of today's hearing was threefold:
  - (i) In the light of limitation, whether the Tribunal has power to hear the claimant's claim of unfair dismissal.

- (ii) Whether to make a wasted costs order against Middlesex Law Chambers in favour of the claimant.
  - (iii) If the case proceeded to set a case management timetable and list it for hearing.
3. The claimant provided to me copies of receipts for sums paid to Middlesex Law Chambers and I had regard to the oral submissions made at the hearing and the preliminary hearing record from the hearing.

**The Law**

4. S.111 of Employment Rights Act 1996 states as follows:-

“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).

(3) Where a dismissal is with notice, an employment tribunal shall consider a complaint under this section if it is presented after the notice is given but before the effective date of termination.

(4) In relation to a complaint which is presented as mentioned in subsection (3), the provisions of this Act, so far as they relate to unfair dismissal, have effect as if—

(a) references to a complaint by a person that he was unfairly dismissed by his employer included references to a complaint by a person that his employer has given him notice in such circumstances that he will be unfairly dismissed when the notice expires,

- (b) references to reinstatement included references to the withdrawal of the notice by the employer,
  - (c) references to the effective date of termination included references to the date which would be the effective date of termination on the expiry of the notice, and
  - (d) references to an employee ceasing to be employed included references to an employee having been given notice of dismissal.
- (5) Where the dismissal is alleged to be unfair by virtue of section 104F (blacklists),
- (a) subsection (2)(b) does not apply, and
  - (b) an employment tribunal may consider a complaint that is otherwise out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.”

5. S207B of the Employment Rights Act 1996 states:

“Extension of time limits to facilitate conciliation before institution of proceedings

- (1) This section applies where this Act provides for it to apply for the purposes of a provision of this Act (a “relevant provision”).

But it does not apply to a dispute that is (or so much of a dispute as is) a relevant dispute for the purposes of section 207A.

- (2) In this section—
- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and
  - (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.

- (3) In working out when a time limit set by a relevant provision expires the period beginning with the day after Day A and ending with Day B is not to be counted.
- (4) If a time limit set by a relevant provision would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.
- (5) Where an employment tribunal has power under this Act to extend a time limit set by a relevant provision, the power is exercisable in relation to the time limit as extended by this section.

6. Rule 10 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-

“Rejection: form not used or failure to supply minimum information

- (1) The Tribunal shall reject a claim if—
  - (a) it is not made on a prescribed form; or
  - (b) it does not contain all of the following information—
    - (i) each claimant's name;
    - (ii) each claimant's address;
    - (iii) each respondent's name;
    - (iv) each respondent's address.
  - (c) It does not contain all of the following information-
    - i. An early conciliation number;
    - ii. Confirmation that the claim does not institute relevant proceedings; or
    - iii. Confirmation that one of the early conciliation exemptions applies
- (2) The form shall be returned to the claimant with a notice of rejection explaining why it has been rejected. The notice shall contain information about how to apply for a reconsideration of the rejection.”

7. Rule 12 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-

“Rejection: substantive defects

- (1) The staff of the tribunal office shall refer a claim form to an Employment Judge if they consider that the claim, or part of it, may be—
  - (a) one which the Tribunal has no jurisdiction to consider;
  - (b) in a form which cannot sensibly be responded to or is otherwise an abuse of the process;
  - (c) one which institutes relevant proceedings and is made on a claim form that does not contain either an early conciliation number or confirmation that one of the early conciliation exemptions applies;
  - (d) one which institutes relevant proceedings, is made on a claim form which contains confirmation that one of the early conciliation exemptions applies, and an early conciliation exemption does not apply;
  - (e) one which institutes relevant proceedings and the name of the claimant on the claim form is not the same as the name of the prospective claimant on the early conciliation certificate to which the early conciliation number relates; or
  - (f) one which institutes relevant proceedings and the name of the respondent on the claim form is not the same as the name of the prospective respondent on the early conciliation certificate to which the early conciliation number relates”;
- (2) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraphs (a), (b), (c) or (d) of paragraph (1).
- (2A) The claim, or part of it, shall be rejected if the Judge considers that the claim, or part of it, is of a kind described in sub-paragraph (e) or (f) of paragraph (1) unless the Judge considers that the claimant made a minor error in relation to a name or address and it would not be in the interests of justice to reject the claim.”
- (3) If the claim is rejected, the form shall be returned to the claimant together with a notice of rejection giving the Judge's reasons for

rejecting the claim, or part of it. The notice shall contain information about how to apply for a reconsideration of the rejection.”

8. **Rule 13 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

**“Reconsideration of rejection**

- (1) A claimant whose claim has been rejected (in whole or in part) under rule 10 or 12 may apply for a reconsideration on the basis that either—
  - (a) the decision to reject was wrong; or
  - (b) the notified defect can be rectified.
- (2) The application shall be in writing and presented to the Tribunal within 14 days of the date that the notice of rejection was sent. It shall explain why the decision is said to have been wrong or rectify the defect and if the claimant wishes to request a hearing this shall be requested in the application.
- (3) If the claimant does not request a hearing, or an Employment Judge decides, on considering the application, that the claim shall be accepted in full, the Judge shall determine the application without a hearing. Otherwise the application shall be considered at a hearing attended only by the claimant.
- (4) If the Judge decides that the original rejection was correct but that the defect has been rectified, the claim shall be treated as presented on the date that the defect was rectified.”

9. **Rule 75 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

**“Costs orders and preparation time orders**

- (1) A costs order is an order that a party (“the paying party”) make a payment to—
  - (a) another party (“the receiving party”) in respect of the costs that the receiving party has incurred while legally represented or while represented by a lay representative;
  - (b) the receiving party in respect of a Tribunal fee paid by the receiving party; or

- (c) another party or a witness in respect of expenses incurred, or to be incurred, for the purpose of, or in connection with, an individual's attendance as a witness at the Tribunal.
  - (2) A preparation time order is an order that a party (“the paying party”) make a payment to another party (“the receiving party”) in respect of the receiving party's preparation time while not legally represented. “Preparation time” means time spent by the receiving party (including by any employees or advisers) in working on the case, except for time spent at any final hearing.
  - (3) A costs order under paragraph (1)(a) and a preparation time order may not both be made in favour of the same party in the same proceedings. A Tribunal may, if it wishes, decide in the course of the proceedings that a party is entitled to one order or the other but defer until a later stage in the proceedings deciding which kind of order to make.”
10. **Rule 76 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

“When a costs order or a preparation time order may or shall be made

- (1) A Tribunal may make a costs order or a preparation time order, and shall consider whether to do so, where it considers that—
  - (a) a party (or that party's representative) has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or
  - (b) any claim or response had no reasonable prospect of success; or
  - (c) a hearing has been postponed or adjourned on the application of a party made less than 7 days before the date on which the relevant hearing begins.
- (2) A Tribunal may also make such an order where a party has been in breach of any order or practice direction or where a hearing has been postponed or adjourned on the application of a party.
- (3) Where in proceedings for unfair dismissal a final hearing is postponed or adjourned, the Tribunal shall order the respondent to pay the costs incurred as a result of the postponement or adjournment if—

- (a) the claimant has expressed a wish to be reinstated or re-engaged which has been communicated to the respondent not less than 7 days before the hearing; and
  - (b) the postponement or adjournment of that hearing has been caused by the respondent's failure, without a special reason, to adduce reasonable evidence as to the availability of the job from which the claimant was dismissed or of comparable or suitable employment.
- (4) A Tribunal may make a costs order of the kind described in rule 75(1)(b) where a party has paid a Tribunal fee in respect of a claim, employer's contract claim or application and that claim, counterclaim or application is decided in whole, or in part, in favour of that party.
- (5) A Tribunal may make a costs order of the kind described in rule 75(1)(c) on the application of a party or the witness in question, or on its own initiative, where a witness has attended or has been ordered to attend to give oral evidence at a hearing.”
11. **Rule 77 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

**“Procedure**

A party may apply for a costs order or a preparation time order at any stage up to 28 days after the date on which the judgment finally determining the proceedings in respect of that party was sent to the parties. No such order may be made unless the paying party has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application.”

12. **Rule 80 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

**“When a wasted costs order may be made**

- (1) A Tribunal may make a wasted costs order against a representative in favour of any party (“the receiving party”) where that party has incurred costs—
- (a) as a result of any improper, unreasonable or negligent act or omission on the part of the representative; or
  - (b) which, in the light of any such act or omission occurring after they were incurred, the Tribunal considers it unreasonable to expect the receiving party to pay.



Costs so incurred are described as “wasted costs”.

- (2) “Representative” means a party's legal or other representative or any employee of such representative, but it does not include a representative who is not acting in pursuit of profit with regard to the proceedings. A person acting on a contingency or conditional fee arrangement is considered to be acting in pursuit of profit.
- (3) A wasted costs order may be made in favour of a party whether or not that party is legally represented and may also be made in favour of a representative's own client. A wasted costs order may not be made against a representative where that representative is representing a party in his or her capacity as an employee of that party.”

13. **Rule 81 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

“Effect of a wasted costs order

A wasted costs order may order the representative to pay the whole or part of any wasted costs of the receiving party, or disallow any wasted costs otherwise payable to the representative, including an order that the representative repay to its client any costs which have already been paid. The amount to be paid, disallowed or repaid must in each case be specified in the order.”

14. **Rule 82 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

“Procedure

A wasted costs order may be made by the Tribunal on its own initiative or on the application of any party. A party may apply for a wasted costs order at any stage up to 28 days after the date on which the judgment finally determining the proceedings as against that party was sent to the parties. No such order shall be made unless the representative has had a reasonable opportunity to make representations (in writing or at a hearing, as the Tribunal may order) in response to the application or proposal. The Tribunal shall inform the representative's client in writing of any proceedings under this rule and of any order made against the representative.”

15. **Rule 84 Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 states as follows:-**

“Ability to pay

In deciding whether to make a costs, preparation time or wasted costs order, and if so in what amount, the Tribunal may have regard to the paying

party's (or where a wasted costs order is made, the representative's) ability to pay."

16. The following authorities were raised by the judge or the parties in the hearing and considered:-
  - 13.1 Adams v British Telecommunications Plc [2017] ICR 382
  - 13.2 Cranwell v Cullen EATS0046/14
  - 13.3 Deadman v British Building and Engineering Appliances Ltd [1974] ICR 53 CA.
  - 13.4 Asda Stores Ltd v Kauser EAT0165/07.
  - 13.5 Capital Foods Retail Ltd v Corrigan [1993] IRLR 430.
  - 13.6 Northamptonshire County Council v Entwhistle [2010] IRLR 740 EAT.
  - 13.7 Marks and Spencer Plc v Williams-Ryan [2005] ICR 1293 Court of Appeal.

#### Findings of Fact

17. The claimant was dismissed by letter date 10 August 2018. This was the effect date of termination.
18. The claimant commenced ACAS early conciliation on 18 September 2018 and the certificate was issued on 18 October 2018.
19. The claimant instructed Middlesex Law Chambers to present his claims to the Employment Tribunal. He made payments for their services to represent him.
20. On 10 November 2018 the claimant's representatives Middlesex Law Chambers submitted a claim for the claimant in connection with race discrimination and unfair dismissal. The solicitors ticked the box to confirm they did not have an ACAS early conciliation certificate number and explained that their claim consisted of a complaint of unfair dismissal which contains an application for interim relief.
21. As found by Employment Judge Lewis on 26 September 2019 there was no valid claim for interim relief within the ET1, any application for interim relief would have to be made no later than 17 August 2018 (s.128(2) of the Employment Rights Act 1996). There was also no reference in the claim form to a matter which could be the basis of any claim for interim relief. If

this has been a valid claim with an ACAS certificate number it would have been a valid claim.

22. On 19 December 2018 Middlesex Law Chambers was informed that the claim had been rejected because “you have not provided an ACAS Early Conciliation Certificate and there is no claim for which interim relief is available”.
23. On 8 January 2019 Middlesex Law Chambers replied attaching the Early Conciliation Certificate, it showed that Day A was 18 September 2018 and Day B was 18 October 2018. The file was referred to Employment Judge who directed acceptance, that the defect in the ET1 had been rectified but the date of rectification and thus the date of submission of the valid ET1 was 8 January 2019.
24. The claim was then presented but this was out of time. There was a delay between the rejection on the 19<sup>th</sup> December 2018 and the resubmission on 8<sup>th</sup> January 2019.
25. These matters were raised with the parties at the preliminary hearing on 26 September 2019 before Employment Judge Lewis. At that hearing the claimant was represented by Counsel who had been instructed on behalf of Middlesex Law Chambers to appear at the preliminary hearing. At the preliminary hearing the claimant withdrew his race discrimination complaint, this was dismissed upon withdrawal. This left the claim of unfair dismissal remaining.
26. The matter was listed for a preliminary hearing before me today to determine the issues identified at the outset of this hearing and set out by Employment Judge Lewis at the last hearing. Counsel having been instructed by Middlesex Law Chambers will have no doubt returned to them the outcome of that hearing in which the purpose of the hearing was explained. In addition, the Employment Tribunal Judgment and record of Case Management Summary was sent to the claimant’s representative with a copy to Mr Khan directly.
27. At the hearing the respondent’s representative confirmed that Middlesex Law Chambers were aware of the hearing as he had written to them on two occasions but not received a reply. The claimant also informed the Tribunal that he had attempted to visit the law firm and see the solicitor but was told that they were busy. The claimant had in addition tried on numerous occasions to unsuccessfully contact them by telephone.
28. The claimant was therefore left in the unfortunate position of representing himself at the hearing. Middlesex Law chambers did not attend having

had the opportunity to make representations and knowing full well that a wasted costs order may be made against them. The claimant did however have the benefit of an interpreter for these proceedings.

29. The claimant provided oral evidence at the Tribunal hearing with the assistance of the interpreter and was able to provide two receipts that he had paid Middlesex Law Chambers the sum of £1,150 in respect of advice in this matter. He informed me he may have paid additional sums but could not recall the amount and had no receipts for the same.

#### Conclusions

30. Given the time points and the acceptance of a valid claim the claimant's claim is clearly out of time. Had the claimant been presented properly in November 2018, it would have been in time. It was not presented validly and was rejected. I concur with the observations made by Employment Judge Lewis that there was no valid claim for interim relief, it would have had to have been made sooner and there was no reference to any matter in the form capable of being one where interim relief was present.
31. I heard no evidence from Middlesex law chambers as to whether this was an administrative error, whether they misunderstood the requirements or how it came to be that they failed to present a valid claim.
32. The question then arises as to whether it was reasonably practicable for the claimant to present his claim in time. I have had regard to the principles set out in the case of Northamptonshire County Council v Entwistle [2010] IRLR 740 EAT that an adviser's fault will not necessarily defeat an attempt to argue that it was not reasonably practicable to present a claim on time where there are exceptional circumstances. .
33. In accordance with the Deadman v British Building and Engineering Appliances Ltd case, if a man engages skilled advisors to act for him and they mistake the time limit and present the claim too late he out, his remedy is against them.
34. Applying the Deadman principle and in particular given the review of the relevant authorities by Lord Phillips in Marks and Spencer Plc v WilliamsRyan [2005], the law derived from the Deadman principle is that where an 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 may defeat any attempt to argue that it was not reasonably practicable to make a timely complaint to the Tribunal.
35. Whilst I accept in accordance with the principles of Northamptonshire County Council v Entwistle [2010] that there are some circumstances where a Tribunal could find it was not reasonably practicable for the

claimant to present his claim in time where the advisor's failure was of itself reasonable.

36. Mr Khan informed the Tribunal that his solicitor was an immigration solicitor. I am not aware of whether this is correct or not but nevertheless Middlesex Law Chambers held itself out to be competent to represent the claimant and took on his case. It undertook to file the claim form on his behalf.
37. This is not a case where the ACAS Early Conciliation number contains an error. It is a case where a legal representative has elected to tick the box to say there is no Early Conciliation Certificate. This is clearly not correct since there was an Early Conciliation Certificate in existence. Further, had the legal representatives understood the legal position it would have been clear that there was no application for interim relief and this was not a case that was suitable for such an application nor was one ever made.
38. There were no circumstances in which a representative could submit a claim in the circumstances of this specific case without an ACAS number. The representative knew or ought to have known that the claim was not valid and would be rejected. A legal representative should know an ACAS EC certificate is a requirement for any claim unless it meets the limited exceptions. The question of reasonable practicability is to be judged by what he could have done if he had been given such advice as he should reasonably in all the circumstances have been given. Here the claimant could have got his claim in one time if his representative had competently submitted the claim as they should have done.
39. I cannot find that the claimant's representative's actions were reasonable in the circumstances. Whilst I have sympathy with the claimant who engaged representatives to assist him with the Tribunal process, the Deadman principle is such that his claim lies against that firm and I find that it was reasonably practicable to present the claim on time. Indeed, had the solicitors completed the form correctly the claim would have been in time and indeed if they had noticed their error promptly this would also be the case.
40. Further, once the claim was rejected, the claimant's representative did not present the claim within such further period as was reasonable. There was a further delay between 19<sup>th</sup> December 2018 and 8<sup>th</sup> January 2019. They did not act in a timely manner.
41. The claimant's representative has not provided any evidence to provide that the presentation was not reasonably practicable.
42. I therefore conclude that the Employment Tribunal does not have jurisdiction to hear this complaint as it is outside of the ordinary time limits

for presenting a claim in accordance with s.111 of the Employment Rights Act 1996. The claimant's claim is therefore dismissed.

43. The claimant made an application for wasted costs in respect of the money he had paid to Middlesex Law Chambers. Middlesex Law Chambers did not attend the hearing or provide any valid reason as to why they were not in attendance.
44. I am satisfied that they had copies of the order and therefore had notice of this hearing but chose not to attend and a decision was therefore made in their absence. In addition to counsel representing the claimant on the last occasion, the claimant and respondent both tell me that they had attempted to engage with the representatives. They have had a reasonable opportunity to make representations in writing or at a hearing in response to the proposal. The purpose of today's hearing was set out in the last case management hearing orders, I am therefore satisfied that the procedure in accordance with rule 82 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 has been complied with.
45. Turning on now to consider whether the Tribunal can make a wasted costs order, I have in mind rule 80 of Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013. This is a three stage test. Firstly, had the legal representative acted improperly, unreasonably or negligently? Secondly, if so, did such conduct cause the applicant to incur unnecessary costs and thirdly is it in the circumstances just to order the legal representative to compensate the applicant for the whole or any part of the relevant costs?
46. It is clear that the claimant's representative has acted improperly, unreasonably or negligently. In light of the findings above and that the claim on no interpretation could have been one where an ACAS EC was not required it therefore follows that the claimant's representative must have acted in an improper, unreasonable or negligent way. To submit a claim in the manner that the claimant's representative did was an abuse of process and one which meets the high standard of misconduct required. Whilst I accept such wasted costs orders are rare, I consider it appropriate in this case. Further, the claimant's representative has not attended today to explain their actions.
47. The claimant has paid to his representative's a number of payments to represent him. Given that their actions have incurred the claimant costs and in light of the circumstances and the sums sought, I do not consider it unreasonable to expect Middlesex Law Chambers to reimburse the claimant for the sums he has paid. Even if their conduct was not negligent it was improper and unreasonable. The Employment Tribunal informed

the claimant that he should take advice on this matter but the only remedy the Employment Tribunal can provide to him was that of his wasted costs.

- 48. The claimant provided receipts for two payments made to Middlesex Law Chambers and in light of the circumstances of this case I have no hesitation in awarding the claimant costs in the sum claimed of £1,150.00
- 49. The Employment Tribunal rules, at rule 84 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 set out that I may have regard to the paying party's or representative party's ability to pay. Given the nature of the paying party and their failure to attend today, I believe that the sums claimed are reasonable.

\_\_\_\_\_18/05/2020\_  
Employment Judge S King

Date: .....

Sent to the parties on: ..03/06/2020....

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For the Tribunal Office