EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Leid		**Optivo**

Heard at: London South Employment Tribunal **On:** 29 May 2020

Before: Employment Judge Hyams-Parish
Members:

Representation:
For the Claimant: Mr G Baker (Counsel)
For the Respondent: Mr R Bennett (Lay Representative)

RESERVED JUDGMENT

It was reasonably practicable for the Claimant to have presented his unfair and wrongful dismissal claims within the required time limits. Even if it was not, he did not present them within such further period as was reasonable. The Tribunal does not therefore have jurisdiction to hear the claims, which are hereby dismissed.

REASONS

Practical matters

1. This case was listed before me for a preliminary hearing to consider whether the Claimant should be allowed to proceed with his claims of unfair and wrongful dismissal, given that his claim form was presented outside the

permitted time limits. It is unfortunate that the time limit issue was not picked up by the parties until a very late stage in proceedings. Indeed, this case came before Employment Judge Khalil for a final hearing in January this year, but for reasons which it is not necessary to go into here, the case was postponed and re-listed. At that hearing, Employment Judge Khalil also listed this Preliminary Hearing to consider the time limit issue. The final hearing is now listed for 20 July 2020 which will now be vacated for reasons set out in this judgment.

2. At the commencement of this preliminary hearing, I was provided with an agreed bundle of documents, together with a separate bundle of authorities by each representative. Both representatives had also prepared a skeleton argument, albeit Mr Bennett's skeleton was headed "Statement on jurisdiction on behalf of the Claimant". I should also add that whilst Mr Bennett is described as a Lay Representative, he was clearly very knowledgeable about the law in this area and had done his research. Both written and oral submissions by the representatives were detailed and well prepared.

3. At the commencement of the hearing, I raised with Mr Bennett whether he proposed to call the Claimant as a witness as I had not seen any witness statement from him. Mr Bennett initially told me that he intended to rely on submissions only but later accepted that it would be difficult for me to conclude that it was not reasonably practicable for the Claimant to have presented his claim in time if I did not have any evidence from him. Mr Bennett therefore conceded that he needed to call the Claimant as a witness. Mr Baker did not object to the Claimant giving evidence without a witness statement and I agreed to allow him some additional time to prepare his cross examination, if needed. Mr Bennett told me that he would also wish to call the Claimant's sister, Linda Leid-Green, to give evidence as she assisted the Claimant with his claim form. Ms Leid-Green sat next to the Claimant throughout the remote hearing and therefore was available to give evidence. Once again, Mr Baker did not object to this.

4. Although this hearing was listed for 3 hours (commencing at 10am), it continued well into the afternoon, with submissions concluding at about 3.30pm. As I had been referred to a number of authorities by the representatives during their submissions, and I wanted to consider the evidence further before reaching my decision, I decided to reserve my decision.

Findings of fact

5. The Claimant was dismissed by the Respondent without notice for gross misconduct on 16 October 2020. He was accompanied at his disciplinary hearing by a trade union representative from the GMB, Patricia Ennis. Ms Ennis was not the Claimant's preferred choice of representative, but the person he had wanted to accompany him, someone who had assisted the

Claimant previously at a disciplinary hearing, was not available. The Claimant was disappointed with the assistance given by Ms Ennis as he felt that she was not sufficiently experienced. There was no evidence before me as to how experienced Ms Ennis actually was as a representative. In any event, Ms Ennis ended up accompanying the Claimant again at his appeal hearing. The appeal was not successful.

6. Ms Ennis continued to represent the Claimant beyond the appeal and commenced the ACAS Early Conciliation (“EC”) process on the Claimant's behalf on 30 November 2017. In the bundle of documents for the hearing today, I saw no evidence of any communication between Ms Ennis and ACAS before 22 December 2017, except for one email on 6 December 2017 from a general ACAS email address to Ms Ennis, attaching an EC certificate (“the EC Certificate”). On that EC certificate, Day A is stated as 30 November and Day B is 6 December 2017. References to Day A or Day B in this judgment refer to the dates provided in the EC Certificate. The unique number referred to on the EC Certificate (otherwise referred to as the “R” number) is R214527/17. This is the same EC number used on the claim form presented to the Employment Tribunal.

7. Notwithstanding the receipt of the EC certificate, I was shown an email to Ms Ennis from an ACAS officer, Kam Edwards, on 22 December at 11.25 referring to a discussion between them that day. It said

> ***As discussed today, Melissa Hanson, who will be dealing with this for the Company, will be on leave until 3 January 2018, therefore the Company would be interested in being granted an extension to the Early Conciliation Deadline. But I can only do this if both parties agree. Please could you discuss this with Michael and let me know his response.***

8. I should add that the header to the above email gives a different “R” number, namely, R215387/17.

9. Ms Ennis responded to Mr Edwards on 27 December 2017 agreeing to an extension of time on behalf of the Claimant and there followed an email from Mr Edwards on 28 December 2017 which said as follows:

> ***Dear Trish***
>
> ***Many thanks for your e-mail confirming that Michael will agree to the extension.***
>
> ***Please note the new Extended EC Deadline is 17-01-2018.***
>
> ***Please also let me know that if Michael does not gain reinstatement as he would like, what he would be looking for as compensation.***

I look forward to hearing from you.

Kind regards,

Kam Edwards

10. As I have said above, during the hearing, both the Claimant and Ms Leid-Green gave evidence. From their evidence, together with the documents referred to, I make the following findings of fact. The Claimant was aware of the need to go through the EC process prior to making a claim in the Employment Tribunal. He spoke to Ms Ennis about his claim and agreed to her seeking an extension to the EC period. The Claimant knew that there was a time limit for presenting a claim to the Tribunal and he said that his understanding was that he had presented his claim in time. In cross examination, the Claimant accepted that he had agreed to Ms Ennis speaking to ACAS and conciliating on his behalf. He also agreed that he had accepted her advice. In re-examination, the Claimant qualified one of his answers when he said that he relied on information given to him by Ms Ennis concerning the EC period. At some point in late December (near Christmas), the Claimant spoke to his sister about taking the dispute to the Employment Tribunal and she agreed to assist him. For whatever reason, the Claimant continued to be unhappy with the assistance provided by Ms Ennis.

11. Ms Leid-Green became more actively involved in helping her brother after Christmas when the Claimant asked her to contact Ms Ennis to find out what was going on with his case. Ms Ennis told Ms Leid-Green that the union had gone as far as it could with the Claimant's case. I do not know the reasons for the union’s apparent withdrawal at this stage. Ms Ennis said that she would send Ms Leid-Green copies of correspondence so she could see what had gone on to date. That correspondence, in the form of emails, was sent to Ms Leid-Green on 17 January 2018.

12. I find that Ms Leid-Green knew that there was a deadline for submitting a Tribunal claim but did not know when that deadline was. There is no evidence of Ms Leid-Green asking Ms Ennis about the deadline, which I find strange. Instead, Ms Ennis informed the Claimant that she needed to contact Mr Edwards at ACAS. Contact was eventually made with Mr Edwards at the end of January and it was about a week before the claim was submitted to the Tribunal on 6 February 2018. When asked about the delay in sending the form, Ms Leid-Green referred to the Claimant needing to see the claim form and sign it, and that she “was not his appointee”.

<u>Relevant law</u>

13. The relevant legislative provisions relating to the EC procedure are found at s.18A of the Employment Tribunals Act 1996 (“ETA”) inserted by s.7 of the

Enterprise and Regulatory Reform Act 2013 which provides:

(1) Before a person ("the prospective claimant") presents an application to institute relevant proceedings relating to any matter, the prospective claimant must provide to ACAS prescribed information, in the prescribed manner, about that matter. This is subject to subsection (7)

(2) On receiving the prescribed information in the prescribed manner, ACAS shall send a copy of it to a conciliation officer.

(3) The conciliation officer shall, during the prescribed period, endeavour to promote a settlement between the persons who would be parties to the proceedings.

(4) If -

(a) during the prescribed period the conciliation officer concludes that a settlement is not possible, or

(b) the prescribed period expires without a settlement having been reached,

the conciliation officer shall issue a certificate to that effect, in the prescribed manner, to the prospective claimant.

(5) The conciliation officer may continue to endeavour to promote a settlement after the expiry of the prescribed period.
…

(8) A person who is subject to the requirement in subsection (1) may not present an application to institute relevant proceedings without a certificate under subsection (4).

…

(10) In subsections (1) to (7) "prescribed" means prescribed in employment tribunal procedure regulations.

…

(12) Employment tribunal procedure regulations may (in particular) make provision -

(a) authorising the Secretary of State to prescribe, or prescribe requirements in relation to, any form which is required by such regulations to be used for the purpose of providing information to ACAS under subsection (1) or issuing a certificate under subsection (4);

(b) requiring ACAS to give a person any necessary assistance to comply with the requirement in subsection (1);

(c) for the extension of the period prescribed for the purposes of subsection (3);

(d) treating the requirement in subsection (1) as complied with, for the purposes of any provision extending the time limit for instituting relevant proceedings, by a person who is relieved of that requirement by

virtue of subsection (7)(a).

14. The Schedule to the Employment Tribunals (Early Conciliation: Exemptions and Rule of Procedure) Regulations 2014 SI 2014/254 ("the 2014 Regulations") sets out the Early Conciliation Rules of Procedure ("the EC Rules") as follows: -

> ***1. To satisfy the requirement for early conciliation, a prospective claimant must -***
>
> ***(a) present a completed early conciliation form to ACAS in accordance with rule 2; or***
>
> ***(b) telephone ACAS in accordance with rule 3.***
>
> ***2.—***
>
> ***(1) An early conciliation form which is presented to ACAS must be—***
>
> ***(a) submitted using the online form on the ACAS website; or***
>
> ***(b) sent by post to the ACAS address set out on the early conciliation form.***
>
> ***(2) An early conciliation form must contain—***
>
> ***(a) the prospective claimant's name and address; and***
>
> ***(b) the prospective respondent's name and address.***
>
> ***(3) ACAS may reject a form that does not contain the information specified in paragraph (2) or may contact the prospective claimant to obtain any missing information.***
>
> ***(4) If ACAS rejects a form under paragraph (3), it must return the form to the prospective claimant.***
>
> ***3.—***
>
> ***(1) A prospective claimant telephoning ACAS for early conciliation must call the telephone number set out on the early conciliation form and tell ACAS—***
>
> ***(a) the prospective claimant's name and address; and***
>
> ***(b) the prospective respondent's name and address.***
>
> ***(2) ACAS must insert the information provided under paragraph (1) on to an early conciliation form.***
>
> ***4. If there is more than one prospective respondent, the prospective claimant must present a separate early conciliation form under rule 2 in respect of each respondent or, in the case of a telephone call made under rule 3, must name each prospective respondent.***
>
> ***5. Contact between ACAS and the parties***

(1) ACAS must make reasonable attempts to contact the prospective claimant.

(2) If the prospective claimant consents to ACAS contacting the prospective respondent, ACAS must make reasonable attempts to contact the prospective respondent.

(3) If ACAS is unable to make contact with the prospective claimant or prospective respondent it must conclude that settlement is not possible.

6. Period for early conciliation

(1) For up to one calendar month starting on the date—

(a) of receipt by ACAS of the early conciliation form presented in accordance with rule 2; or

(b) the prospective claimant telephoned ACAS in accordance with rule 3, the conciliation officer must endeavour to promote a settlement between the prospective claimant and the prospective respondent.

(2) The period for early conciliation may be extended by a conciliation officer, provided that the prospective claimant and prospective respondent consent to the extension and the conciliation officer considers that there is a reasonable prospect of achieving a settlement before the expiry of the extended period.

(3) An extension under paragraph (2) of the period for early conciliation may only occur once and may be for up to a maximum of 14 days.

7. Early conciliation certificate

(1) If at any point during the period for early conciliation, or during any extension of that period, the conciliation officer concludes that a settlement of a dispute, or part of it, is not possible, ACAS must issue an early conciliation certificate.

(2) If the period for early conciliation, including any extension of that period, expires without a settlement having been reached, ACAS must issue an early conciliation certificate.

8. An early conciliation certificate must contain—

(a) the name and address of the prospective claimant;

(b) the name and address of the prospective respondent;

(c) the date of receipt by ACAS of the early conciliation form presented in accordance with rule 2 or the date that the prospective claimant telephoned ACAS in accordance with rule 3;

(d) the unique reference number given by ACAS to the early conciliation certificate; and

(e) the date of issue of the certificate, which will be the date that the certificate is sent by ACAS, and a statement indicating the method by

which the certificate is to be sent.

9.—

(1) Where ACAS issues an early conciliation certificate, it must send a copy to the prospective claimant and, if ACAS has had contact with the prospective respondent during the period for early conciliation, to the prospective respondent.

(2) If the prospective claimant or prospective respondent has provided an email address to ACAS, ACAS must send the early conciliation certificate by email and in any other case must send the early conciliation certificate by post.

(3) An early conciliation certificate will be deemed received—

(a) if sent by email, on the day it is sent; or

(b) if sent by post, on the day on which it would be delivered in the ordinary course of the post.

15. Further, provision has been made under s.207B of the Employment Rights Act 1996 ("ERA") modifying the limitation regime in respect of the early conciliation requirements being complied with, which provides:

(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.

16. The time limits for bringing a claim of unfair dismissal is provided in s.111 ERA:

> ***(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.***

17. Article 7 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 provides equivalent provisions for claims of wrongful dismissal or other breach of contract claims.

18. Whilst not referred to during the hearing, Underhill LJ provided a useful summary of caselaw on the reasonably practicable test in the case of **Lowri Beck Services Ltd v Brophy [2019] EWCA Civ 2490**, when he said as follows:

> ***There has been a good deal of case law about the correct approach to the test of reasonable practicability. The essential points for our purposes can be summarised as follows:***
>
> ***(1) The test should be given "a liberal interpretation in favour of the employee (Marks and Spencer plc v Williams-Ryan [2005] EWCA Civ 470, [2005] ICR 1293, which reaffirms the older case law going back to Dedman v British Building & Engineering Appliances Ltd [1974] ICR 53).***
>
> ***(2) The statutory language is not to be taken as referring only to physical impracticability and for that reason might be paraphrased as whether it was "reasonably feasible" for the claimant to present his or her claim in time: see Palmer and Saunders v Southend-on-Sea Borough Council [1984] IRLR 119…..***
>
> ***(3) If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.***
>
> ***(4) If the employee retains a skilled adviser, any unreasonable ignorance or mistake on the part of the adviser is attributed to the employee (Dedman).***

(5) The test of reasonable practicability is one of fact and not of law (Palmer).

Analysis and conclusions

19. During his submissions, Mr Bennett argued that the EC certificate was invalid because the ACAS conciliator did not comply with sections 18A(3) and (4) ETA, or the EC Rules, in so far as they impose requirements on the ACAS officer to contact the parties and attempt to conciliate. He referred to there being no contact between the ACAS conciliator and Ms Ennis or the Respondent during the period commencing on Day A and ending on Day B and there being no attempt to promote a settlement between the parties. Alternatively, he argued that even if Day A was a valid date, Day B should be 17 January 2018, thereby reflecting the extension agreed by Mr Edwards. I do not believe there is any dispute that if Day B was 17 January 2018, the unfair dismissal claim was brought in time.

20. In relation to the first argument, there is no evidence from which I can conclude that the ACAS officer did not comply with s.18A ETA. I did not hear evidence from Ms Ennis or the ACAS conciliator during this hearing and neither the Claimant or Ms Leid-Green provided any evidence in support of Mr Bennett's argument. I find that neither they or Mr Bennett know what attempts were made by the ACAS officer to contact the parties between Days A and B. It appears that the extent of the evidence relied on by Mr Bennett is the absence of email correspondence between Ms Ennis and the ACAS conciliator during the period between Days A and B. However, the absence of email correspondence does not mean there was no attempt to conciliate. Firstly, there was some question during the hearing whether the emails before me represented all the emails in existence, leaving open the possibility that there may have been emails from the ACAS officer but we simply did not have them at the hearing and the Claimant may not have seen them. Secondly, there may have been attempted telephone contact. The obligations imposed by s.18A are not onerous. I cannot draw the conclusion that I am invited to by Mr Bennett that the ACAS officer did not do what he was statutorily obliged to do.

21. I should add that I remain somewhat puzzled by the above argument raised by Mr Bennett in any event, because for me to have found that the EC Certificate was invalid would likely have meant that the Claimant could not have proceeded with his claim, as there would be no EC Certificate, and one is required for the Claimant to bring a claim.

22. On Mr Bennett's second point, I cannot agree with him that I should treat Day B as 17 January 2018 as opposed to the date referred to as Day B on the EC Certificate. The only EC Certificate it appears exists is the one sent by email to Ms Ennis on 6 December 2018. I do not believe I can, or should, go behind that date. The only interpretation, therefore, that can be given to

the further period of conciliation between 7 December 2017 and 17 January 2018 is that it was a voluntary period of conciliation and not part of the mandatory early conciliation regime referred to above. I consider this situation to be no different to the cases where there has been a second period of early conciliation resulting in the issue of a second EC Certificate. We know from two cases **HM Revenue and Custom v Garau [2017] ICR 1121 EAT** and **Romero v Nottingham City Council EAT 0303/17** that a second period of early conciliation does not affect time limits as set out at s.207B(3) and (4) ERA.

23. In view of the above, my conclusion is that the primary limitation period ended on 15 January 2018, but was then extended by 6 days to 21 January 2018, pursuant to 207B(3) ERA. As the Claimant presented his claim on 6 February 2018, it was out of time. The Tribunal therefore only has jurisdiction to hear the claims if it was not reasonably practicable for the Claimant to have presented his claims on time. If it was not, I then have to be satisfied that he presented his claims within such further period as was reasonable. This is the effect of the provisions at s.111 ERA and the equivalent provisions covering breach of contract claims referred to above.

24. In his submissions, Mr Bennett said that the EC certificate was issued in error and the ACAS Conciliator failed to provide the Claimant with a certificate with a Day B of 17 January 2018. He said that Parliament could not have intended that a claimant who complies with the statutory obligations with respect to EC should be denied justice because of a failure by ACAS to comply with its own duties. Mr Bennett submitted that the Claimant relied on a genuine belief that the information provided by the ACAS Conciliator was accurate and thus it was not reasonably practicable for the Claimant to have presented his claim in time.

25. Mr Bennett referred me to the cases of **Rybak v Jean Sorelle Ltd 1991 ICR 127, London International College Ltd v Sen 1993 IRLR 333**, **DHL Supply Chain Ltd v Fazackerley EAT 0019/18** and **Dixon Stores Group v Arnold EAT 0772/93**. In the **Rybak** and **Sen** cases the Claimants had both relied on incorrect information given to them by tribunal staff about the deadline for submitting their tribunal claims. In the **Fazackerley** and **Arnold** cases the Claimant's were given advice about the deadline for submitting claims in the Employment Tribunal by the job centre and an ACAS officer respectively. In each of the cases, the Tribunal had decided on the facts that it was not reasonably practicable for the Claimant's to bring their claims in time.

26. I have considered the evidence carefully and the authorities I have been referred to and consider the Claimant's case should be distinguished from the above authorities. Here, the ACAS officer, Mr Edwards, did not advise the Claimant or Ms Ennis about a deadline for submitting a claim; he simply informed Ms Ennis that the EC period was extended until 17 January 2018.

27. I consider it reasonable for Ms Ennis, on behalf of the Claimant, to have enquired of Mr Edwards about the status of the extended EC date and how this affected the deadline to submit a Tribunal claim, particularly given the EC Certificate that had already been issued. It appears that the extension period was also in excess of the 14 days allowed, yet this does not appear to have rung any alarm bells with Ms Ennis or caused her to query this. To the extent that she, as a professional adviser, failed to act on the first certificate, or query the effect of the extended EC period on time limits, then applying the principle in Dedman, mistake on the part of Ms Ennis is attributed to the Claimant.

28. I am mindful that it appears the union representative had ceased to act for the Claimant by 17 January 2018 and at that stage, the Claimant still had four days to present the Tribunal claim form within the permitted time limit. Given that both the Claimant and Ms Leid-Green knew that there was a time limit for presenting the claim to the Tribunal, I consider that it was reasonable for them to have sought clarification from the union and/or ACAS of the deadline and I consider that there was a reasonable time period for the Claimant and/or his sister to do this prior to 21 January 2018. Their failure to do so means, in my view, that they cannot avail themselves of the escape clause in s.111 ERA.

29. Even if it was not reasonably practicable for the claim to be submitted by 21 January 2018, I do not believe that the claim was submitted within such further period as was reasonable. A period of just over two weeks passed, after 21 January 2018, before the claim was submitted on 6 February 2018. I did not get any sense from the witnesses that they were treating with some urgency the submission of the Tribunal claim.

30. For the above reasons, it is my judgment that the Tribunal does not have jurisdiction to hear the claims of unfair and wrongful dismissal, which are therefore dismissed.

Employment Judge Hyams-Parish
5 June 2020