



EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4107657/2021 (A)

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Held via Cloud Video Platform (CVP) on 25 May 2021

Employment Judge: R King

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Mrs Gillian Paget

**Claimant
In Person**

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Asda Stores Limited

**Respondent
Represented by:
Miss Badham -
Barrister**

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JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the claimant's unfair dismissal claim has been lodged out of time, and not being satisfied that it was not reasonably practicable to lodge it in time, finds that it does not have jurisdiction to hear the claim, which is dismissed

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REASONS

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1. The claimant has presented a claim for unfair dismissal. The respondent resists the claim on its merits and also on the ground that it is time barred in circumstances where it was presented out of time and it would have been reasonably practicable for the claimant to have presented it in time.
2. In the circumstances this preliminary hearing to determine the issue of time bar was fixed. The Tribunal heard evidence from the claimant only and found her to be a candid and credible witness.

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Findings in fact

Having heard the claimant's evidence, the Tribunal finds the following facts to be admitted or proved.

3. The claimant is Gillian Paget. She was employed by the respondent at its
5 Chesser store in Edinburgh between November 2012 and 20 November 2020 when she was summarily dismissed.
4. Although she was aware of the three month time limit for presenting her claim, she did not contact Citizens Advice for advice about bringing a claim until
10 early February 2021. Her delay until then in doing so was because she was still dealing with the aftermath of Christmas and because her husband had also been dismissed by the respondent around that time. Although Citizens Advice did not advise her specifically about the early conciliation requirement and its effect on the time limit they did advise her to contact Acas.
5. At this point in time the claimant was unaware that Acas had any role in the
15 process of presentation of a claim to the Employment Tribunal. Her understanding was that the role of Acas was to assist in conciliation where parties to a dispute wished to negotiate a settlement. As a result, her belief was that Acas would not have a role to play in the process as she did not want her job back and she did not believe the respondent would agree to that
20 in any event. Nevertheless, she did as Citizens Advice had advised her and she contacted Acas by telephone on 15 February 2021.
6. Having discussed her situation with the Acas helpline and having explained to the adviser that she wanted to raise a Tribunal claim, Acas sent her an e-mail dated 15 February 2021 in the following terms, which contained a
25 number of hyperlinks, (shown underlined) –

"Dear customer

Thank-you for your call to our Helpline today. Here are the links we promised to send you.

Employment Tribunal guidance – This material gives you information about the Employment Tribunal procedures and forms

Early Conciliation explained – These pages explain early conciliation in more detail

5 *Early Conciliation Notification Online Form – Follow this link to submit an Early Conciliation notification form online*

11717359"

7. Having received this e-mail but having taken no further advice the claimant followed only the first link. This took her to the online ET1 claim form, which she then completed and submitted on 15 February 2021 without having taking any steps to engage with early conciliation.

8. When completing section 2.3 of the ET1 claim form the claimant inserted the reference number '11717359' from the Acas e-mail of 15 February e-mail in the box for the Acas early conciliation certificate number. She also placed a 'x' in the box that indicated that her claim contained an application for interim relief and was therefore exempt from the requirement to provide an early conciliation certificate number. Her claim did not however contain an application for interim relief.

9. Having submitted her claim form without completing early conciliation, she was subsequently contacted by the Tribunal administration who explained that her claim could not be accepted without an Acas early conciliation certificate number and that her claim form would be returned to her.

10. She subsequently contacted Acas on 3 March 2021 to commence early conciliation and an early conciliation certificate was issued that same day, following which she resubmitted her claim form on 8 March 2021. The short delay between the issuing of the early conciliation certificate on 3 March and her resubmission of the claim form on 8 March was due to her having to care for her son who had been unwell to the extent that he had been hospitalised.

Submissions*Submissions for the Claimant*

11. The claimant made a brief submission that her delay in commencing proceedings was a result of her having made an error of judgment and invited the Tribunal to allow her claim to proceed.

Submissions for the Respondent

12. On behalf of the respondent Miss Badham submitted that it had been reasonably practicable for the claimant to have presented her claim in time. In the alternative, even if it had not been reasonably practicable, she had not submitted it within a reasonable time after the original time limit expired.
13. The respondent accepted that the claimant's delay had been a result of her ignorance of the requirement to comply with the early conciliation process before submitting her claim form. However her ignorance had not been reasonable. Having contacted Acas on 15 February 2021 she had been provided with all of the relevant guidance she had required in order to comply with the early conciliation requirement in time but had chosen not to follow it.
14. It had clearly been reasonably practicable for her to commence her claim in time if she had followed the guidance that had been sent to her. Instead she had proceeded on the basis that Acas would only have a role in the process if she wanted her job back. It was more likely than not that Acas had given her the correct advice and she had simply not followed it. This should therefore be the end of her claim as it had been reasonably practicable for her to commence early conciliation in time, which would have extended the time limit for presenting her claim.
15. Alternatively, if the Tribunal accepted that it had not been reasonably practicable for her to commence early conciliation in time, the claimant had only at the stage of this preliminary hearing made any mention of her son's illness having caused a further delay until 8 March 2021. She submitted that the Tribunal should therefore not be satisfied on balance that her son had

been in hospital at the relevant time and it should find that she had not provided an acceptable reason for the further delay in bringing her claim.

The relevant law

16. The law relating to time limits in respect of unfair dismissal claims is contained
5 in the Employment Rights Act 1996. Section 111, so far as relevant for present purposes, provides as follows: -

“111(1) A complaint may be presented to an employment Tribunal against an employer by any person that he was unfairly dismissed by the employer.

10 *(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

15 *(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. 207B of the Employment Rights Act 1996 provides as follows –

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

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

(2) In this section—

30 *(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.

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(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.

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(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.

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(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."

18. The effect of section 207B(3) is to 'stop the clock' during the period in which the parties are in early conciliation and thereby extend the limitation period by the number of days between day A and day B. However, where the limitation period has already expired before early conciliation commences there is no extension for early conciliation – **Pearce v bank of America Merrill Lynch UKEAT/0067/19**

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19. Thus where a claim has been lodged outwith the three month time limit, the Tribunal must consider whether it was not reasonably practicable for the claimant to present the claim in time. The burden of proof lies with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present the claim in time, then the Tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

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20. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability. In **Lowri Beck Services Ltd v Brophy 2019 EWCA Civ 2490**, Lord Justice Underhill summarised the essential points as follows:

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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

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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 not 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*).

Discussion and decision

21. It was common ground in the case that the claimant’s date of termination of employment was 20 November 2020, which is the date from which the time should run. The limitation period for the claimant’s claim therefore expired on 19 February 2021. As the claimant did not commence early conciliation before that date, there was no extension of time in terms of section 207B(3) and therefore the presentation of her claim on 8 March 2021 was out of time.
22. There are two elements to the test which the Tribunal must apply; the first question is whether it was reasonably practicable for the claimant to have lodged the claim in time; the second question is whether, when it became

reasonably practicable to lodge the claim, the claim was lodged within a reasonable time thereafter.

23. While the claimant admits she was aware of the three month time limit for commencing proceedings she was unaware of the requirement to comply with the Acas early conciliation requirement before presenting her claim to the Tribunal. The question therefore is whether her ignorance of that requirement was reasonable in the circumstances.
24. The Tribunal was satisfied that by 15 February 2021 she had contacted Acas and that they had provided her with links to all of the guidance she required in order to take the steps required to comply with the early conciliation requirement before presenting her claim.
25. The reason the claimant gave as to why she did not engage with early conciliation was that she believed Acas would only have a role to play if both parties were willing to conciliate. However she did not want her job back and she did not expect the respondent would want her back.
26. Had the claimant followed all of the links on the Acas e-mail of 15 February she would have found out about the essential nature of the early conciliation process and she would have been able to access the online form in order to engage with that process in time. To have followed those links would have been simple and straightforward. Had she done she would have been able to comply with the early conciliation requirement and the time for presenting her claim would have been extended.
27. While the Tribunal accepts that the claimant made an appropriate inquiry to Acas it is also clear that she did not follow the advice that the helpline sent to her. In fact her evidence was she did not even read essential parts of it. It cannot therefore be said that her ignorance of the necessary steps she had to take in order to ensure her claim was presented in time was reasonable. As a result she has not shown that it would not have been reasonably practicable for her to present her claim in time.

28. The Tribunal does not therefore need to consider whether the claimant raised her claim within a reasonable time after the original time limit expired on 19 February 2021.

29. In all the circumstances the Tribunal does not have jurisdiction to hear the claimant's claim, which is dismissed.

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Employment Judge: Robert King
Date of Judgment: 14 June 2021
Entered in register: 17 June 2021

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and copied to parties