EMPLOYMENT TRIBUNALS

Claimant AB

Respondent: Centrica Storage Ltd

HELD AT: Hull **ON:** 4 March 2020

BEFORE: Employment Judge T R Smith

REPRESENTATION:

Claimant: Litigant in person

Respondent: Ms Harman (Solicitor)

RESERVED JUDGMENT

1. It was not reasonably practicable for the Claimant to present his complaint of unfair dismissal within the time set out in section 111 of the Employment Rights Act 1996("ERA96") and he presented it within such further time as was reasonable.
2. The complaint of disability discrimination was not presented within the time set out in section 123 of the Equality Act 2010 ("ERA96") and it is just and equitable to extend time.

REASONS

Issues.

1. The issues were set out in a notice of the hearing from Regional Employment Judge Robertson in the following terms namely:-
2. Was the Claimant's claim form out of time and if so whether the Tribunal had jurisdiction to consider it.

Evidence.

3. The Claimant gave oral evidence and was cross examined.
4. The Respondent produced an agreed bundle of documents totalling 78 pages
5. No evidence was called on behalf of the Respondent.
6. At the start of the hearing I specifically drew to the parties three decisions that were potentially relevant namely, **Software Box Ltd v Gannon 2016 ICR 148, EAT** , **Adams -v- British Telecommunications Plc [2017] ICR 382 , and Lawrence v Yesmar Restaurants t/a McDonalds ET Case No.1302367/2015**

Findings of fact

7. The agreed effective date of termination of the Claimant's employment with the Respondent was on 03 December 2018.
8. Whilst on notice the Claimant appealed against the decision to dismiss him and that appeal was rejected, prior to the effective date of termination.
9. The Claimant also raised grievances whilst under notice and was notified of the outcome of those grievances, just after the effective date of termination on 04 December 2018.
10. The Claimant believed, at the latest, on 03 December 2018 that he been treated badly.
11. He contacted ACAS on 03 December 2018 and provided the prescribed early conciliation information on 03 December 2018.
12. The Claimant knew that in order to present an Employment Tribunal claim he had to undertake the prescribed early conciliation procedure with ACAS.
13. An ACAS early conciliation certificate was issued on 17 January 2019.

14. The Claimant knew, from that date, he could present an Employment Tribunal claim.

15. There is no dispute, that having regard to the provisions relating to the extension of time for both unfair dismissal and discrimination claims, that the last date for the Claimant presenting a claim was 16 April 2019.

16. The Claimant had experienced ill-health prior to his dismissal. In January 2018 he was advised by his employers to speak to his GP as regards his high blood pressure.

17. The Claimant was absent from work from, possibly 04 April to the middle of May 2018 and thereafter for 23 June 2018 until his dismissal.

18. In 2019 the Claimant contends he was suffering from anxiety.

19. Whilst the Claimant did refer to partial non-compliance, in his judgement, of a subject access request I am satisfied that prior to the expiration of the time limit the Claimant had sufficient information to draft a claim form to the employment Tribunal.

20. He started to complete an Employment Tribunal claim form in early 2019.

21. However, he concluded that, about the start of April 2019, that it would be to his benefit to take professional advice. His aim was that his claim was put into a format easily understandable by an Employment Tribunal and it was to be correctly lodged on his behalf.

22. It was therefore at about the start of April 2019 that the Claimant approached Wilkin Chapman, solicitors. He selected them because they were the biggest firm in his area.

23. All contact was either by telephone or email.

24. Wilkin Chapman were not to go on the record for him, but merely to act as his agent in this task.

25. The Claimant was aware of the time limit for presentation and emphasised this to Wilkin Chapman.

26. On 12 April 2019 Wilkin Chapman sent an email to the Employment Tribunal enclosing the Claimant's claim form ("the first claim") and indicating they were

simply presenting the claim form on behalf of the Claimant and were not on record.

27. Wilkin Chapman received a standard pro forma e-mail auto reply thanking them for their email.

28. On the same day Wilkins Chapman wrote to the Claimant by email.

29. That email said that the firm had submitted the Claimant's claim to the Employment Tribunal that morning and that the Tribunal would make contact with the Claimant *"in the coming weeks"*. It also advised that the claim form would be sent to the Respondent who would be required to submit a response and the Claimant would be notified of the next steps required in progressing his claim, and the hearing date. Attached to that email was the email sent by Wilkin Chapman, earlier that day, to the Tribunal with a copy of the claim form.

30. There are only three prescribed methods of presenting an Employment Tribunal claim form. Firstly online, secondly by post to Employment Tribunal central office in Leicester or thirdly by hand delivery to named designated employment Tribunal offices.

31. The Leeds Employment Tribunal is a designated office.

32. There is no provision for presentation by email to one of those named designated Employment Tribunal offices. It follows the first claim form was not presented in any of the prescribed manners. A firm of solicitors would know, and the Claimant was entitled to expect to assume, that they would ensure his claim form was presented within the time limit and correctly.

33. If the claim form had been presented in the prescribed manner there will be no issue as to time.

34. The standard claim form contains the following wording *:-"if your claim has been submitted online or posted you should receive confirmation of receipt from the office dealing with your claim within five working days. If you have not heard from them within five days, please contact that office directly. If the deadline for submitting the claim is closer than five days you should check that it has been received before the time it expires"*

35. The Claimant was not concerned as to the above wording of the first claim given he knew that an email acknowledgement been received by Wilkin Chapman on 12 April 2019.

36. In about August or September the Claimant became concerned about the fact he had not heard from the Tribunal. He did not speak directly to the Tribunal but undertook some googling and articles ,similar to those he viewed, were in the bundle. Those articles talked of delays at the Employment Tribunal due to the increase of work following the abolition of fees and a shortage of both judicial and administrative resources. They also talked about delays on the telephone of up to 2 hours.

37. He thought that he could expect a hearing in about eight months from the commencement of proceedings having read the articles. He was not aware, and I accept his evidence on this point as he is not a lawyer, that there would be any form of detailed case management prior to a hearing.

38. He therefore did nothing until Christmas was approaching when he became worried. He considered by now he should have received a hearing date given what he had read. He decided to contact the Tribunal directly by email.

39. The Tribunal received an email from the Claimant on 21 December 2019 stating *"I have not yet received any correspondence regarding my ET claim which was submitted on April 12, 2019 (as below). Please can you confirm when I am likely to hear anything"* The *"as below"* was the email from Wilkin Chapman to the Claimant dated 12 April 2019 along with the copy e-mail to the Tribunal .

40. The Claimant was advised by the Employment Tribunal, on or about 24 December 2019, that given service of the first claim form was by direct email it would have been rejected and returned.

41. The Claimant promptly submitted an identical claim form ("the second claim") that same day.

42. The Tribunal operates a system where documentation in respect of returned claims is destroyed within six months. Thus, it was not possible to demonstrate that a rejection form had been generated by the Tribunal. I accept entirely the Claimant's evidence that he did not receive a rejection form. I found him to be a credible witness who gave his evidence in a very straightforward manner. I am satisfied that if a rejection form had been sent to him he would have

immediately spoken to Wilkin Chapman. Indeed, the fact that he became concerned about delay is a further factor that points in his favour. He had nothing to gain by delaying matters, or by not acting on a rejection form.

43. A letter from the Tribunal dated 14 January 2020 acknowledge receipt of the second claim.

44. On 11 February 2020 the Respondent submitted a response. Not unnaturally they raised the issue of jurisdiction as regards whether the second claim was presented within time.

45. The dismissing and appeal officer of the Respondent remain employed by the Respondent.

46. The Respondent has retained documentation in relation to the Claimant's dismissal, albeit the notes of various meetings were not verbatim but do summarise, in the Respondents view, the relevant issues discussed.

47. It is also appropriate to briefly summarise the complaints the Claimant has made to the Tribunal.

48. The first is one of unfair dismissal with, as I already mentioned the effective date of termination of 03 December 2018.

49. Further the Claimant contends he has the protected characteristic of disability.

50. He brings forward claims of direct discrimination, discrimination arising from disability and victimisation. They are poorly particularised, which is surprising given that they were professionally drafted.

51. The Claimant made it clear in his evidence that the discrimination arises from the redundancy process which started on 19 June 2018 and led to his dismissal. In essence he believes that he was selected for redundancy and thus dismissed because he was a disabled person or because of his sickness, the result of his disability, he was treated unfavourably by means of being dismissed. The victimisation claim is more difficult to understand. The protected act apparently was an informal grievance with the alleged detriment being dismissal.

52. The Claimant has yet to take any action against Wilkin Chapman, preferring to deal with this issue first.

Submissions

Claimant

53. The Claimant stressed that he trusted his solicitors and assumed the first claim was properly presented.

54. If he knew there'd been an error he would have reacted earlier; when he did find out from the Tribunal of the difficulty he faced he immediately lodged the second claim.

55. Although he was concerned as to delay with the first claim, he thought that was due to overwork in the Tribunal system.

56. Part of the reason for the delay was the Tribunal did not reject his claim as it should have done. Had they done so he would have reacted more promptly.

57. Whilst he did not chase the Tribunal until December, he was generally anxious and somewhat depressed.

Respondent

58. Ms Harman produced a written skeleton argument (for which I am grateful) which she expanded upon in oral submissions.

59. I mean no disrespect to her by not repeating those submissions in any detail but had full regard to them.

60. In essence she stated in respect of the unfair dismissal the fault lay with the Claimant's then solicitors and his remedy was to sue those solicitors. They could be reasonably expected to ensure that the first claim was presented in accordance with the prescribed methods.

61. She said it was clear that in respect of the unfair dismissal it was reasonably practicable to present a claim because that was what had happened. It followed the second limb of section 111(2) ERA96 was not engaged.

62. If she was wrong on that point, while she did not criticise any delay between the Claimant discovering from the Tribunal the position as regards the first claim and then addressing that issue, she did criticise the delay between the first claim been sent to the Employment Tribunal and the Claimant not contacting the Employment Tribunal until December.

63. Turning to the discrimination claims she said that the factors set out in section 33 of the Limitation Act 1980 were matters that I can give proper consideration too and took me to **British Coal -v- Keeble [1997] IRLR 336.**

64. She emphasised to me the decision in **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA** stressing the exercise of the discretion under section 123 EQA10 was the exception rather than the rule.

Discussion and conclusions.

65. I should begin by stating that I have not found this an easy judgement as I can see force in Ms Harman's submission as to why should the Respondent now face a claim, where delay is principally the fault of the Claimant's solicitors to file the first claim in accordance with the required procedure, and thereafter delay has been caused by the Tribunal in not issuing a rejection notice.

66. The test I must apply in respect of the unfair dismissal complaint is set out in section 111 (2) ERA 96 and reads as follows: –

"… 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"

67. The burden of proof is upon the Claimant and the standard of proof is the balance of probabilities.

68. It should be noted that the Tribunal can only consider an extension of time if it is satisfied that it was not reasonable practicable for the complaint to be presented within the primary time-limit.

69. The extensive authorities stress that that the exercise the Tribunal must undertake is fact specific.

70. I find that all that is required for a claim form to be "presented" is that it arrives at the Tribunal office, see **Sealy-v- Consignia Plc [2002] EWCA Civ 878**.

71. I also note that under Rule 90(b) of the Employment Tribunal (Constitution and Rules of Procedure) Regulations 2013 that there is a presumption that documents sent by means of electronic communication are delivered, unless the contrary is proved, on the day of transmission. Here an acknowledgement was received on the day of transmission from the Tribunal to the Claimant's then solicitors.

72. Under Rule 8 a claim may only be started by presenting a completed claim form using a prescribed form and in accordance with any practice direction made under Rule 11.

73. I have already referred to the practice direction issued as regards the correct method of presentation of a claim form made pursuant to Rule 11.

74. Absent any authority I would have concluded that it was reasonably practicable for the first claim to be presented within time because the Claimant had all the information he required and indeed Wilkin Chapman were able to draft a claim form on the basis of his instructions. But for their error the first claim could have been presented in time in one of the three prescribed manners . On this basis, the Claimant could not then take the benefit of the discretion allowed under section 111(2).

75. However, the position is not without authority.

76. The first relevant case in time is that of **Software Box Ltd v Gannon 2016 ICR 148, EAT.**

77. Whilst this was a decision of the then President of the EAT it should be noted that only one party was represented and therefore all points may not have been argued as fully as in other hearings.

78. The case turned on unusual facts. The Claimant submitted a claim form for unfair dismissal, within time, but due to a series of administrative delays at the Tribunal's Unit (which at the time dealt with the issue of fees and fee remission) the Claimant did not become aware that a claim had been rejected until after the expiration of the primary time limit whereupon she then submitted a further identical claim. The decision therefore has to be looked at through the lens of a claimant who was wholly innocent yet faced the prospect of not being able to pursue her claim.

79. The EAT held that if a claimant in the Employment Tribunal reasonably considered that there was no need to make a claim, and had innocently failed to realise that the time limit applied to the claim, because the claimant had already made a claim that remained effective, it was open to the Tribunal to consider a second claim made once the claimant realised that his or her view was mistaken. Accordingly, the Tribunal could decide to permit the claim to continue if it was satisfied that it had not been reasonably practicable to bring the second claim earlier.

80. The President emphasised that there was nothing prevented another claim been presented on identical grounds.

81. The next relevant decision in time is that of the EAT in **Adams -v- British Telecommunications Plc [2017] ICR 382 .** The facts in **Adams** were the Claimant submitted her first claim but did not correctly record the early conciliation number on the claim form and this is a mandatory requirement under rule 10. She became aware that this error two days after the expiration limitation and promptly remedied the same.

82. The EAT stressed that where an otherwise valid claim had been rejected because of minor error on the claim form, and a new corrected claim for been presented out of time the focus should be on the second claim when a Tribunal was considering its discretion to extend time. The EAT held that the fact there was a first defective claim did not automatically render it reasonably practicable to presented in time. I observe in this case there was no rejection by the Tribunal.

83. The third case is a first instance decision. It follows that I am not bound to follow any legal principles set out therein, unlike with a decision or decisions of the EAT. In addition, I have not been able to obtain a full transcript of the judgement and had to rely upon what I found in IDS. In **Lawrence v Yesmar Restaurants t/a McDonalds ET Case No.1302367/2015** an Employment Tribunal rejected a Claimant's submission that her second claim should be accepted where a mistake had led to her first claim being rejected. The claimant attempted to submit her claim by post to the Birmingham Employment Tribunal but it was rejected as it did not comply with the prescribed methods for submitting a claim She presented it again, late. The Tribunal considered the EAT's observation in

SoftwareBox Ltd v Gannon that if a claimant reasonably considers that there is no need to make a claim, not therefore understanding (for very good reasons) that the time limits apply to a claim as they do, because she had already made a claim which remains effective it would be open to a Tribunal to consider the second claim made by the Claimant once the belief was realised. However, the Tribunal found that L, acting through her professional adviser, had made mistakes that were not reasonable and had a belief that was not reasonable, and her understanding was not based on very good reasons. She had no just excuse for not presenting her claim in time.

84. Pulling the authorities together I conclude that I am required to focus on the second claim and what was the impediment to the timely presentation of that claim. I must have regard to the reason why the Claimant did not present a valid claim in time, see the well-known dicta of Brandon L.J. in **Walls Meat Co. Ltd -v- Khan 1979 ICR 52 at 60F.**

85. It appears to me that the Claimant reasonably believed the first claim had been correctly lodged. He had an e-mail acknowledgement. He used reputable solicitors. The Tribunal had not alerted him to any error. It was for that reason he did not lodge the second complaint.

86. In the intervening period he had no reason to believe that his claim was not valid until he spoke to the Tribunal on 21 December 2019 and thereafter acted properly. Up until that point he was labouring under the misapprehension that he had a valid claim. Whilst I have noted the submission of Ms Hardman, skilfully constructed that it is, that the time between April and December that should be concentrated upon I am not persuaded that the Claimant can be fairly criticised. Whilst it is true he was told by his solicitors he would properly hear from the Tribunal in a matter of *"weeks"* the Claimant did start to research the matter and came to the conclusion on the evidence he found on the Internet that there were extensive delays in the Employment Tribunal system. He was not a lawyer and would not know, as observed, about case management. Many litigants may have enquired with the Tribunal earlier stage but I cannot say that leaving matters until December 2019 was unreasonable from what the Claimant knew at the time. He started to enquire after 8 months , the time it was suggested in the articles he googled that that was the time when a hearing could be expected.

87. I have concluded that I have to find that the first claim was not presented within time and then move on to the issue of reasonable practicability.

88. If it is not "reasonably practicable" to present in time, as I conclude I must find, I then have to consider whether to allow an extension and if so it must be the such further extension as is reasonable. There is no definition of what is reasonable and it will depend upon the facts and the explanation put before me:- **Marley (UK) Ltd -v- Anderson [1996] 163 CA**. That said it is expected that the Claimant will act expeditiously:- **Theobald -v- Royal Bank of Scotland PLC EAT/0444/06.**

89. It was only reasonable practicable for the Claimant to submit the second claim when he knew of the difficulties with the first claim. He knew of the difficulties on 21 December and very promptly acted by submitting the second claim on 24 December 2019.

90. A factor I must consider is prejudice. Whilst in both **Gannon** and **Adams** the prejudice was all one way, the Claimant losing the right to bring a claim such that if a claim was valid they would be left remedy less, here I have to factor in that the Claimant would potentially have a claim in negligence against his solicitors, at the very least in connection with the unfair dismissal claim.

91. I also must take into account the fact that the Respondent will now face legal proceedings and even if they were to succeed, it is unlikely they will recover their legal costs.

92. However, given, as will be seen I would have extended time in any event for the discrimination claims, which includes the dismissal and will almost inevitably cover the same or very similar grounds to that of the unfair dismissal I have concluded that the greater prejudice is to be Claimant.

93. It is appropriate that I briefly deal with my reasoning why I would have extended time, in any event, for the discrimination claims

94. The relevant provisions are found in section 123 EQA10.

95. Section 123 of the EQA 10 states: –

"…Proceedings on a complaint … may not be brought after the end of –

(a) the period of three months starting with the date of the act to which the complaint relates, or

(b) such other period as the Employment Tribunal thinks just and equitable….

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it

(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something-

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it."

96. An Employment Tribunal has a wide discretion in determining whether or not it is just and equitable to extend time. That said the power of the Tribunal is a discretion and the burden is on the Claimant to convince the Tribunal that it is just and equitable to extend time. The discretion is the exception rather than the rule, **Robertson-v-Bexley Community Centre 2003 IRLR 434 CA.**

97. If there are circumstances which would otherwise render it just and equitable to extend time, the length of extension required is not of itself, a limiting factor unless the delay would prejudice the possibility of a fair trial see **Afolabi -v- Southwark LBC 2003 EWCA Civ 15**.

98. Whilst the Tribunal in exercising its discretion is not required to adopt the checklist set out in section 33 of the Limitation Act 1980 it can be a useful tool for the Tribunal to consider.

99. Factors set out in section 33 include: –

    1. The length and reason for the delay.
    2. The extent the cogency of the evidence may be affected
    3. The extent, if at all of the failure of the employer to cooperate
    4. What action the Claimant took when the Claimant became aware of a potential claim and in particular how promptly they acted
    5. Action taken by the Claimant to obtain professional advice when aware of the claim.

104. The above is not a comprehensive checklist and other relevant matters that may be considered including the length of the extension sought. A likely highly significant factor is whether the delay would affect the conduct of a fair trial:- **DPP -V- Marshall 1998 ICR 518.**

105. I start from the position that on the basis of how the Claimant puts his claim I am satisfied the allegations of discrimination are a continuing act which cumulate with the Claimant's dismissal. They relate to the same process and subject matter. Indeed, it was not argued that there were a series of unconnected acts prior to dismissal by Ms Harmon. It follows that time would therefore run from the effective date of termination.

106. The length of delay is approximately eight months. That is a factor that weighs in favour of the Respondent. It is not the case of where it is only a few days. That said as I have explained in my judgement why the Claimant labouring under the misapprehension that he had a valid claim that was being processed by the Tribunal.

107. I am not satisfied that the cogency of the evidence will be significantly affected. Whilst I take Ms Harman's point that any delay must inevitably have some effect on a witnesses recollection, given the redundancy process was documented and key decision-makers are still available to the Respondent I do not regard this as a factor weighing heavily against the Claimant. The Respondent will not be significantly prejudiced simply by the delay.

108. There is no suggestion Respondent has been uncooperative. In fact, the Respondent is a victim of circumstances of errors made by the Claimant solicitors and the Tribunal.

109. The Claimant acted promptly when he was informed of 21 December 2018 of the difficulty and remedied the same by 24 December 2018, a matter of just three days.

110. The Claimant had taken professional advice and in my judgement honestly believed the first claim was valid and was proceeding.

111. When I stand back and where all these factors, whilst I have some sympathy for the Respondent, the overriding matter is whether there could be a fair trial and in this case there can be a fair trial and thus it will be just and equitable to exercise my discretion.

112. I therefore concluded that time should be extended both in respect of unfair dismissal and the discrimination complaints and I have issued consequential directions.

113. This hearing would not have been required had the first claim been presented in time. It is open to the Respondent to make a cost application and it may be prudent for the Claimant to speak to Wilkin Chapman in that regard as to their position

Employment Judge T R Smith

Date: 9 March 2020