EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4113670/2019 (V)

Preliminary Hearing
On 5 June 2020

Employment Judge M Robison

Mr R Brown	**Claimant** **In person**
The Chief Constable of the Police Service of Scotland	**Respondent** **Represented by** **Ms Aileen Irvine** **Solictor**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The Employment Tribunal, having decided that the 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.

REASONS

1. The claimant lodged a claim in the Employment Tribunal claiming public interest disclosure detriment. The respondent resists the claim.
2. At a case management preliminary hearing which took place by telephone conference call on 25 March 2020, Employment Judge Kearns ordered that there should be a preliminary hearing on the question of time bar to take place by way of a video conference.
3. In accordance with her directions, the claimant lodged a witness statement limited to the time bar point, referring to documents which were forwarded to

the Tribunal in a joint bundle, referred to in this judgment by page number. The respondent chose not to call any witnesses.

4. At the outset of the hearing I referred the parties to the guidance on remote hearings and made reference to the protocol set out there, and in particular the prohibition on recording these proceedings without the consent of the Tribunal.

5. I heard evidence from the claimant only, via video conferencing. I found the claimant to be a candid and credible witness, and I accepted his evidence.

Findings in fact

6. The claimant lodged a claim in the Employment Tribunal on 28 November 2019, claiming detriment following public interest disclosure. That claim was rejected by letter dated 6 December 2019 on the grounds that the claimant had not complied with the requirement to contact ACAS before instituting relevant proceedings. At section 2.3, he ticked the box stating “my employer has already been in touch with ACAS”.

7. The claimant was on a pre-planned trip to London from 9 to 13 December 2019, and was not aware that his claim had been rejected until he returned.

8. Immediately on his return, he notified ACAS of his intention to pursue a claim and an EC certificate was issued dated 16 December 2019.

9. The claimant re-sent the ET1 claim form on 18 December 2019, with the EC number included, and a copy of the EC certificate, and a request for the rejection to be reconsidered.

10. That was considered by an Employment Judge on 23 December 2019, and by letter dated 27 December 2019, the claimant was advised that his claim had been accepted. The date of presentation was 18 December 2019.

11. The alleged detriment to which the claim relates took place on 30 August 2019.

The relevant law

12. The law relating to time limits in respect of public interest disclosure claims is contained in the Employment Rights Act 1996. Section 48, so far as relevant for present purposes, provides as follows:

> (1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B……
>
> (3) An employment tribunal shall not consider a complaint under this section unless it is presented -
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates, or where that act or failure is part of a series of similar acts or failures, the last of them, 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.
>
> (4) For the purposes of subsection (3) –
>
> (a) where an act extends over a period, the "date of the act" means the last day of that period, and
>
> (b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer….shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act, or if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done".

13. Thus where the 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 his claim in time, the burden of proof lying with the claimant. If the claimant succeeds in showing that it was not reasonably practicable to present his claim in time, then the tribunal must be satisfied that the time within which the claim was in fact presented was reasonable.

14. The Court of Appeal has recently considered the correct approach to the test of reasonable practicability (*Lowri Beck Services Ltd v Brophy* [2019] EWCA Civ 2490). Lord Justice Underhill summarised the essential points 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 479, [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 [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 law (*Palmer*).

Submissions for respondent

15. Ms Irvine submitted that this claim should be dismissed because the Tribunal has no jurisdiction to hear the claim, it having been lodged outwith the time limit set out in section 48(3) of the Employment Rights Act. Given agreement that time runs from 30 August 2019, the claimant ought to have contacted ACAS no later than 29 November 2019. In fact the claimant did not contact ACAS until 15 December 2019, and no claim was lodged until 18 December 2019.
16. The respondent submits that the claimant's ignorance of the requirement to enter into ACAS EC is not reasonable because the information on which he relies to support his detriment claim was communicated to him on 30 August

2019; he is an experienced party litigant who is still involved in live employment tribunal proceedings which commenced in 2014 which also relate to public interest disclosures; he confirmed in evidence that he was aware of his legal right to pursue the claim, having done so in 2014; he confirmed that he was aware of the time limits which applied; he was aware of the need to enter ACAS early conciliation in 2014; and he had previously followed the correct procedures.

17. The claimant failed on this occasion to take heed of the ET claim form at 2.3 and its references to ACAS EC. It was not reasonable for the claimant to ignore that clear statement and the clear reference to guidance being available on the ACAS website, as well as the gov.uk website. Given sign posts to that guidance, he should have made some enquiries about the process.

18. Mr Brown accepted in evidence that the guidance is clear, but relies on the fact that there is no reference to Section 18A in the ET1. He does however rely on rule 93, but there is no reference to that rule on the ET1 form either. Further, if he had considered the rules carefully as he said he did, he would have known that 10(1)(c) states that the form will be rejected unless it includes an EC number.

19. The respondent's position is that the claimant has failed to overcome the first hurdle of the test, that it was not reasonably practicable to lodge the claim in time. The respondent submits that given the level of knowledge of time limits and his previous experience of EC and ET litigation, it was reasonably practicable for the claimant to have submitted the claim prior to the time limit. The claimant's submission, that the guidance at 2.3 as well as the government guidance and ACAS guidance are insufficient for a party litigant to appreciate that they had to contact ACAS first, is not reasonable.

20. In support of her submission, Ms Irvine relied on the case of *Sodexo Health Care Services Limited v Harmer* UKEATS/0079/08, and in particular paragraph 25, which she submitted has parallels with this claim. Specifically, here the claimant was aware of the ACAS EC procedure having previously followed it in 2014; he made an assumption that there was no requirement to contact ACAS for this claim, but that was not a reasonable assumption, when time limits were within his knowledge.

Submissions for the claimant

21. Mr Brown submitted that the respondent is conflating the guidance on the government websites with the legal requirements, and that argument has nothing to do with their time bar application, which relates to section 18A. The respondent has not put forward a shred of evidence to support their position that a party litigant would be aware that contacting ACAS was a legal requirement.

22. The claimant's ignorance of that legal requirement is clear from his evidence. He relied on Rule 93, and relying on that, if a claimant is not aware of section 18A ERA, then they would assume that ACAS would be contacted by the Tribunal; and that the claimant would not also be involved in that process. He understood that conciliation takes place irrespective of whether a claimant applies for conciliation or not. He states that he was not aware of section 18A and that as a party litigant he was not aware that he required to make a notification to ACAS, in addition to that being done by the Tribunal under rule 93, there being no reference to section 18A or rule 93 on the claim form itself. This gives the impression that the Tribunal would make the ACAS EC referral, and that claimants were not also required to make it in addition to any Tribunal referral.

23. He pointed out that the respondent was not interested in conciliation when he lodged the claim in 2014, and that although he was interested at that time, he was no longer interested in taking part in conciliation. He assumed that the respondent would not be interested in conciliation this time either. He further submits in his witness statement that there was no unfairness to the respondent, since there would in any event be no question of early conciliation being entered into, given the extant criminal investigation which would prevent EC until such criminal investigation was complete.

24. While the claimant accepts that the various screen shots (from the gov.uk website) say what the respondent says is stated there, he does not accept that these relate to the respondent's time bar application, which is based on section 18A of the ERA, and they have not produced anything relating on that. He accepts that there is a generic warning in the ET1 about early conciliation, but that does not amount to breaching section 18A.

25. While the ACAS certificate was missing, the claim was otherwise in time, even if it was lodged just before the three month deadline. He submits therefore that the respondent's argument is simply a technicality. When he found out about the problem, he remedied it as quickly as possible.

26. Relying on the overriding objective in Rule 2, the claimant submitted that it was disproportionate to time bar his claim for the absence of a certificate, which he obtained as soon as he could, relating to the process of early conciliation which could not take place anyway due to the existence of criminal investigations. Rule 2 also states that unnecessary formality is to be avoided, and flexibility to be encouraged, which would point to his claim being accepted although out of time.

27. He submitted that party litigants would not have an awareness of section 18A. He had relied on Rule 93 and submitted these are matters which are confusing to a party litigant who only has one previous experience of lodging a claim. Mr Brown said that he was not aware of rule 10; and that Ms Irvine is contradicting herself and the respondent can't have it both ways.

28. With regard to the *Sodexo* case, the point raised there is different and there is only one general reference to ACAS. In paragraph 25, it is suggested that the claimant in that case was unaware of the three month time limit. His case is different because he was aware of the three month time limit and he had submitted it on time, but without an ACAS certificate.

29. He submitted that the Tribunal has it within its gift to extend the three month period for the few days that it took for him to remedy the defect, and in the particular circumstances of his case his claim should be allowed to proceed.

Tribunal decision

30. There was much common ground in this case. In particular, it was accepted by both parties that the last date of any alleged detriment was 30 August 2019.

31. That is therefore accepted as the date from which any time limit should run. The claim should therefore have been lodged by 29 November 2019, or at least the claimant should have contacted ACAS by that date to avail himself of the extension of time afforded by the early conciliation process.

32. The claimant accepts that his claim is lodged out of time. He relies on the fact that it was not reasonably practicable for him to lodge the claim in time given the circumstances of this case.

33. There are two elements to the test, the first is the question whether it was reasonably practicable for the claimant to have lodged the claim in time, and the second question is whether, when it became reasonably practicable to lodge the claim, the claim was lodged within a reasonable time thereafter.

34. It is clear that the reasonably practicable question relates not just to physical impracticability, but also to other forms of mental impracticability relating for example to the claimant's knowledge. The case law makes it clear that may include a claimant's ignorance or mistake about time limits, and the focus is on whether that mistake or ignorance was reasonable. It is not enough for the claimant to show that he was ignorant of his rights, but he must also show that he took reasonable steps to acquire the necessary knowledge.

35. In this case the claimant was well aware of the time limits. His ignorance related to the question of the ACAS EC process. I was prepared to accept, as was the respondent, that the focus here was the question whether the claimant's misunderstandings about the ACAS EC process were reasonable in the circumstances.

36. The claimant accepted that he had not contacted ACAS initially. His position was that he had lodged the claim within the three month time limit by lodging the claim on 28 November 2019 (although he admitted that he had left it to the last minute and absent the EC number) and that any argument that he had failed to lodge the claim in time was a mere technicality.

37. His position is that he believed that this would be done by the Tribunal. He said that his understanding was informed by rule 93 of the Employment Tribunal Rules of Procedure, which states that in a case where conciliation is provided for, the Tribunal will send of copy of the claim form to ACAS. His position was that this would cause any party litigant to submit an otherwise valid claim without notifying ACAS, believing that the notification would be undertaken by the Tribunal.

38. This of course relates to post claim conciliation, which is different from the more recently introduced pre-claim conciliation, now called early conciliation,

and I gather from the claimant's submissions that he now realises that he mixed up the two roles of ACAS in this regard.

39. He states that he was not aware of section 18A and that as a party litigant he was not aware that there was a legal requirement for him to make a notification to ACAS, in addition to that being done by the Tribunal under rule 93, there being no reference to section 18A or rule 93 or on the claim form itself.

40. In his written submissions, the claimant submits that it was "not reasonable" for the ACAS EC certificate to be lodged in the circumstances of his case. However the question is not whether it was "reasonable" but rather whether it was "reasonably practicable" to have lodged the claim in time.

41. Although I am aware that "reasonably practicable" test should be given a liberal interpretation in favour of the employee, I came to the view that it could not be said that any ignorance about the requirement to contact ACAS prior to lodging a claim was reasonable in this particular case for the following reasons:

    1. The claimant is an experienced party litigant, having been pursuing a public interest disclosure claim since 2014;
    2. Although he was getting some advice at that time, he has previously lodged a public interest disclosure claim, and correctly completed the early conciliation process;
    3. When completing a form on-line, the following is included:
        (i) a link to government guidance "making a claim to an employment tribunal" (page 112);
        (ii) links to advice in response to the question "are you in time" (page 116);
        (iii) a section headed, "have you contacted Acas", which states "before making a claim to an employment tribunal you have to contact Acas to use their free early conciliation service", and under the "what you'll need" section, it states "your Acas early conciliation certificate number" (page 117);

(iv) a section headed “Tell Acas you’re making a claim”, and under it “If you want to make a claim to an employment tribunal, you must contact Acas first” (page 119); and

(v) Under the hearing “time limits”, there is advice about time limits, and it is stated, “Acas must receive your early conciliation notification before the end of the limitation date” (page 121).

4. The claim form itself clearly states at section 2.3 that “nearly everyone should have this number before they fill in a claim form. You can find it on your Acas certificate. For help and advice call Acas or visit [the Acas website]”.

42. Although there is no reference to the relevant section or the relevant rules, the above guidance is designed to facilitate the process for party litigants, presumably to avoid them having to consult the rules directly, which admittedly may be confusing.

43. Further and perhaps crucially very large numbers of party litigants whose claims are processed are able to appreciate from this guidance that they must obtain an EC certificate. It is true that a significant minority are rejected when first lodged for want of an EC number, but most often that error is corrected within the relevant time limits.

44. While it may well be that the relevant legal provisions are confusing to a party litigant, especially the need to cross refer between different provisions, the claimant is expected to take reasonable steps to acquire the necessary knowledge, and in this case it is clear that the claimant did not consult the guidance which was easily accessible to him.

45. As to the claimant’s argument that the respondent could not enter into early conciliation even if they wanted to, which he believed they did not following what happened with his previous claim, the case of *Cranwell v Cullen* UKEAT/0046/14 illustrates the mandatory nature of the EC notification process (even where neither party might have any intention to enter into any conciliation talks).

46. This is another one of those case, which we see frequently in this Tribunal, where the claimant (or indeed representatives) have left lodging claims to the very last minute, and where they do not build in time to correct any errors

which can unfortunately occur. This risk lies with the claimant, especially when time limits are strictly adhered to since they go to the question of jurisdiction.

47. I have some sympathy with the claimant in this case, and his assumption that the respondent already knew about other claims he was making and had previously shown no interest in early conciliation. But as the President, Mr Justice Langstaff, put it in the *Cranwell* case "the question however is not one of sympathy; the question is one of the law which is applicable". Nor is this an issue in respect of which the claimant can prey in aid the overriding objective or rely on a disproportionality argument, nor indeed rule 6 regarding irregularities, given the mandatory nature of the requirement and the focus on the reasonable practicability test.

48. In my view if the relevant enquiries are made as directed, the procedure is clear, not only for legally qualified representatives, but also for party litigants many of whom will have no experience of the employment tribunal procedure at all.

49. I should add that as I am not able to conclude that it was not reasonably practicable for the claimant to have lodged the claim in time, I do not require to consider the second element of the test. That said, clearly the claimant sought to remedy the defect as soon as he became aware of it, that is within a reasonable time.

Conclusion

50. This claim, as the claimant accepts, is lodged out of time. For the reasons set out above I cannot be satisfied that it was not reasonably practicable to lodge the claim in time. The Tribunal therefore does not have jurisdiction to hear the claim, which is dismissed.

Employment Judge: Muriel Robison
Date of Judgment: 15 June 2020
Entered in register: 16 June 2020
and copied to parties