EMPLOYMENT TRIBUNALS

Claimant: Mr M Schofield

Respondent: Trios Facilities Management Limited

Heard at: Bristol (by video) **On:** 27 October 2021

Before: Employment Judge O'Rourke

Representation
Claimant: In person
Respondent: Mr A MacMillan – counsel

PRELIMINARY HEARING JUDGMENT

The Claimant's application to extend time for his claim of unfair dismissal to be presented, subject to s.111(2)(b) of the Employment Rights Act 1996, is granted.

REASONS

Background and Issues

1. The Claimant was employed by the Respondent for approximately ten years, as compliance engineer, until his dismissal with effect 14 August 2020, on grounds of redundancy. As a consequence, he brought a claim of unfair dismissal, which also raised the possibility of a claim of automatic unfair dismissal, subject to Regulation 7 of the Transfer of Undertakings (Protection of Employment) Regulations 2006 (TUPE) [3-16].

2. It was agreed between the parties that the limitation date for presentation of the claim, allowing for ACAS Early Conciliation (EC), was 5 January 2021. However, while the Claimant initially attempted to present his claim on 2 January 2021, the Tribunal rejected it, by letter of 27 January 2021 [17], because the named Respondent in section 2 of the ET1 form was not the same as that named on the ACAS EC certificate [2]. The Claimant had named his employer, as 'Trios Compliance Limited' on the certificate, but, on the ET1, instead named a Mr Mark Lendon, an HR manager at the

Respondent. In response, on the same day, the Claimant applied for reconsideration of that decision, stating that he had filled in the ET1 incorrectly [18]. The Tribunal granted that application, by letter of 26 February 2021, treating the claim as having being presented on 4 February 2021, therefore approximately a month over the time limit [20].

3. The Respondent raised this issue in their particulars of claim and it was listed for this preliminary hearing [31].

The Law

4. I referred myself to s.111(2) of the Employment Rights Act 1996 (ERA), which states:

(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) 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.

5. I also referred myself to the following cases:

   a. **Dedman v British Building and Engineering Appliances Ltd [1974] ICR 53 EWCA**, in which Lord Denning MR set out the principles to be considered in such a case, to include the reasons for the failure to meet the deadline, whether there was acceptable ignorance of the fact and other factors, such as awaiting information from the employer, or physical impediments etc. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (**Porter v Bandridge Ltd [1978] IRLR 271 EWCA**).

   b. **Adams v British Telecommunications plc [2016] UKEAT ICR 382**, as to consideration of second claims presented out of time not being excluded by the presentation of a first claim in time (albeit a defective one).

6. Mr MacMillan referred me to the case of **Wall's Meat Co Ltd v Khan [1979] EWCA ICR 52**, which stated, at pages 60F-61A:

> *"… The performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits, such performance. The impediment may be physical … or the impediment may be mental, namely, the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to, essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within the period of three months, if the ignorance on the one hand, or*

the mistaken belief on the other, is itself reasonable. Either state of mind will, further, not be reasonable if it arises from the fault of the complainant in not making such enquiries as he should reasonably in all the circumstances have made, or from the fault of his solicitors or other professional advisers in not giving him such information as they should reasonably in all the circumstances have given him."

The Facts

7. I heard submissions from both parties, which I summarise below.

8. Respondent. In summary, Mr MacMillan made the following submissions:

    a. The decision is a question of fact for the Tribunal, with the focus being on the Claimant's state of mind, viewed objectively (**Wall's Meat**).

    b. **Adams** does present some materially different facts from this case before the Tribunal. In **Adams**, the claimant had provided an incorrect EC number, but it was nonetheless determined by the EAT that the the mistake was genuine and unintentional, in her reasonable belief.

    c. The difference in this case is the Claimant's explanation, in which he states that he accepts his error, but put in Mr Lendon's name, an HR manager, as he was '*the only contact I had as all the managers and colleagues had been named* (sic) *redundant. I was confused to what I was to put on the form as Spie Facilities Limited were still paying my salary and furlough payments up to 31 July 2020. I now know I should of* (sic) *put Trios Compliance Ltd in this section …'* [46]. It's a not uncommon error, but this is not merely making an error in the EC number, but naming another person as the Respondent. If he was genuinely confused, this doesn't account for why he names the correct employer in the EC certificate.

    d. If he was unclear, it would have been reasonable to expect the Claimant to have raised several certificates, or to make appropriate enquiries.

    e. Focusing on the Claimant's state of mind (**Wall's Meat**) and while it may be the case that he was confused, the question is whether it was a reasonable course of action to offer a different name in the ET1.

    f. While it is a regrettable error on his part, the 'reasonably practicable' test sets a high threshold, which the Claimant has not met.

9. Claimant. The Claimant stated that it was simply a '*human error'* on his part and that legal matters '*were not my thing'*. He cannot afford a solicitor and had only brief initial advice from ACAS. He asked that his application be granted.

10. Consideration. I decided to grant the Claimant's application, for the following reasons:

    a. Applying **Adams**, I am not debarred from considering the second claim and the facts and circumstances surrounding it, in considering the degree to which the Claimant was at fault in making the error he did and then in failing to appreciate that the error had been made.

    b. The Claimant's error was one that under Rule 12(2A) of the Tribunal's Rules of Procedure 2013 permitted the Judge considering it discretion not to reject the claim, if he considered that the Claimant had made an error in relation to a name or address (subject to Rule 12(1)(f)) and it would not be in the interests of justice to reject the claim. While the Judge quite properly exercised his discretion, as he saw fit, the fact that he was permitted discretion in that instance (as opposed to having no discretion in relation to other 'substantive defects', as set out in Rule 12(1)(a) to (d)), indicates a less substantive defect in this case than others. **Adams** refers, in this context, to an '*escape route … in respect of minor errors'* (20).

    c. I am satisfied, objectively that when the Claimant presented his first claim, his state of mind was that he was confused by the requirements of the form, particularly as the Respondent (it was not disputed) was in a state of flux in the period following the Claimant's dismissal, having entered into a company voluntary arrangement and the Claimant was being paid by another company (presumably the Administrator). It was, therefore, understandable, in his desire that his claim be seen by somebody at the Respondent that he named the HR manager. While he did name the correct Respondent in the EC certificate, his concern with the claim form was that it would be transmitted to a person at the Respondent company who would be in a position to see and react to it. This was a genuine and unintentional mistake on his part.

    d. He did not, at the time he lodged his first claim, have any reason to believe it contained the defect it did, until informed by the Tribunal. Had he done so, he would, I am confident, have rectified it. This lack of knowledge therefore constituted the impediment to him presenting his second claim within time.

    e. I note also that the Claimant has had no formal legal advice and no previous experience of such claims.

    f. On being notified of the error, he immediately applied to rectify it and therefore presented the claim within such further time as was reasonable.

11. Conclusion. I conclude therefore that it was not reasonably practicable for the Claimant to present his claim in time and that accordingly he can rely on s.111(2)(b) ERA, in order to extend time to present his claim.

Employment Judge O'Rourke
Date: 27 October 2021

Judgment & Reasons sent to the Parties: 16 November 2021

FOR THE TRIBUNAL OFFICE